

Supreme Court, U. S.
FILED

DEC 14 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. **77-856**

PHILLIPS PETROLEUM COMPANY, *Petitioner,*
v.

IRL SHUTTS, as Executor of the Estate of Althea
Shutts, Individually, and as representative of all that
class of gas royalty owners under Phillips Petroleum
Company oil and gas leases in the Hugoton-Anadarko
area, *Respondents.*

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
KANSAS**

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**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
KANSAS**

Petitioner Phillips Petroleum Company prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Kansas entered in these proceedings on July 11, 1977.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Kansas is reported at 222 Kan. 527, 567 P.2d 1292, and appears in the Appendix hereto. (26a) The unpublished judgment and opinion of the District Court of Kiowa

County, Kansas, dated July 29, 1976 (App. 6a), modified on August 13, 1976 (App. 11a), makes reference to stipulations in the Pretrial Order filed April 14, 1976, which is reproduced in pertinent part in the Appendix. (12a)

JURISDICTION

The judgment of the Supreme Court of Kansas was made and entered on July 11, 1977. A timely motion for rehearing was denied on September 15, 1977 (App. 65a), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3). The Supreme Court of Kansas is the highest court of the State of Kansas in which a decision can be had.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law....

Article VI of the United States Constitution provides in pertinent part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The statutory provisions involved are set forth in the Appendix beginning at page 1a. They include the following:

1. Kansas Statutes Annotated, Sections 60-223 and 60-266.
2. Section 4(e) of the Natural Gas Act, 15 U.S.C. § 717c(e).

QUESTIONS PRESENTED

I. The Kansas Supreme Court has ruled that under the Kansas class action statute (K.S.A. 60-223), Kansas state courts have jurisdiction to render a judgment binding upon unnamed nonresident members of a plaintiff class, even though such persons have absolutely no contact with the State of Kansas. Further, the Kansas court has held that jurisdiction over such nonresidents is established "if procedural due process guarantees are met." (App. 42a, 567 P.2d at 1308) The first question presented is whether the exercise of *in personam* jurisdiction by a state court over unnamed nonresident members of a plaintiff class, having no contact with the forum state, under a standard of procedural due process, and not "minimum contacts" with the forum state, exceeds the constitutional limitations of the state's power and violates the Due Process Clause of the Fourteenth Amendment.

II. The Kansas Supreme Court has ruled that Petitioner must pay interest on additional royalties paid in 1972, for the period prior to the time the royalties were ascertained and due and payable. The second question presented is whether the decision to award interest, on equitable grounds, for the period when the final

payment of royalty was properly delayed by operation of federal law so offends notions of fairness as to be violative of the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

Petitioner Phillips Petroleum Company ("Phillips"), during the times relevant to this action, was engaged in the production and purchase of natural gas from mineral leases in the Hugoton-Anadarko area and the sale of its gas to various pipeline companies for transportation and resale in interstate commerce.¹ Respondents were royalty owners in said leases.²

Numerous respondents entered into separate agreements with Phillips which provided, *inter alia*, that the royalty to be paid should be computed in relation to the weighted average price per Mcf received by Phillips during any calendar month from all sales of gas delivered by Phillips within a certain "designated area" in the Hugoton-Anadarko area.³

In September 1970, Federal Power Commission ("FPC") Opinion No. 586 was issued and it became final in October 1972. *In re Hugoton-Anadarko Area Rate Case*, 466 F.2d 974 (9th Cir. 1972). Opinion No.

¹ The Hugoton-Anadarko area is a Federal Power Commission rate making area encompassing generally the State of Kansas and the Panhandle Section of Texas and Oklahoma. 18 C.F.R. § 154.106 (g).

² The royalty relationship was governed by oil and gas leases and amendments thereto, including gas royalty agreements.

³ The "designated area" is Texas County, Oklahoma, and Sherman and Hansford Counties, Texas.

586 determined the lawful rates for interstate sales of gas in the Hugoton-Anadarko area. The effect of Opinion 586, insofar as Phillips and the respondents are concerned, was its approval, in whole or part, of Phillips' nineteen pending applications for permission to increase prices for the sale of gas by Phillips within the "designated area." Insofar as the rate applications were approved it meant that the respondents were entitled to receive approximately \$5,700,000 in additional royalties relating to gas production between 1961 and 1970. In December 1972, Phillips disbursed the additional royalties to the respondents, who numbered over 6,400.⁴

Irl Shutts, a resident of Kansas, brought this action on behalf of himself, and other royalty owners having leases in the Hugoton-Anadarko area to whom Phillips had disbursed additional royalties, to recover interest thereon. Over Phillips' jurisdictional objection (Defendant's Motion to Dismiss Purported Class Action As to Non-Resident Class Plaintiffs, Record on Appeal, p. 19) the trial court certified Irl Shutts as a member and proper representative of a class of the royalty owners (including nonresidents) who received additional royalty payments from Phillips. The *only contact* between the State of Kansas and the plaintiff class was the residency in that state of 218 of its members.

The District Court of Kiowa County, Kansas, heard the case as a class action under K.S.A. 60-223. On the merits, and over Phillips' objection that no interest is to be awarded where the payment of the principal sum

⁴ For a fuller, and more detailed discussion of the facts in this case, the Court's attention is directed to the factual recitation in the opinion of the Kansas Supreme Court. (App. 26a-35a, 567 P.2d 1298-1304)

properly is delayed by federal law, the trial court concluded that Phillips was liable for interest. The trial court's ruling was appealed to the Kansas Supreme Court, which affirmed the trial court with regard to its holdings that: (1) it had jurisdiction over unnamed nonresident plaintiff class members who had no contact with the State of Kansas; and (2) that Phillips must pay interest on the additional royalties notwithstanding their final distribution was properly delayed by federal law.

These two holdings form the basis of Phillips' petition to this Court.

REASONS FOR GRANTING THE WRIT

For the first time in the United States, a state court has attempted to exercise *in personam* jurisdiction over a nationwide plaintiff class in which ninety-six percent of the class members were nonresidents of and had no contact whatsoever with the forum state. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), held that in order to subject a party who is not present within the forum to *in personam* jurisdiction, he must have "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Ignoring *International Shoe*, the Kansas Supreme Court held that "the element necessary to the exercise of jurisdiction over nonresident plaintiff class members is procedural due process," and not minimum contacts with the forum state. (App. 38a, 567 P.2d at 1305) (emphasis in original) This assertion of personal jurisdiction over nonresident parties having no contacts, ties, or relations with the State of Kansas and who have not affirmatively

submitted themselves to the jurisdiction of its courts is an egregious violation of the Due Process Clause of the Fourteenth Amendment. "[A] State, in seeking to assert jurisdiction over a person located outside its borders, may only do so on the basis of minimum contacts among the parties, the contested transaction, and the forum state." *Shaffer v. Heitner*, — U.S. —, 97 S.Ct. 2569, 2588 (1977) (Brennan, J., concurring and dissenting).

It is imperative that this Court grant certiorari in this case and decide whether state court jurisdiction over a plaintiff class in a nationwide class action must be determined by the traditional jurisdictional requirements set forth in *International Shoe* and *Shaffer*, or whether some new and expanded concept of state court jurisdiction is to be constitutionally sanctioned.⁸ The likelihood of other multistate class actions in state courts is not a mere possibility but a reality. At this time there are a number of similar class actions involving nonresidents pending in the courts of Kansas which have assumed jurisdiction over the nonresident class members. See, e.g., *Nix v. Northern Natural Gas Producing Company*, 567 P.2d 1322 (Kan. 1977); *Sterling v. Superior Oil Company*, 567 P.2d 1325 (Kan. 1977); *Maddox v. Gulf Oil Corporation*, 567 P.2d 1326 (Kan. 1977); and *Gray v. Amoco Production Company*, 564 P.2d 579 (Kan. Ct. App. 1977).

Furthermore, the award of interest by the Kansas Supreme Court constitutes a denial of due process of law to Phillips. It is clearly contrary to concepts of

⁸ *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) and *Snyder v. Harris*, 394 U.S. 332 (1969), preclude most nationwide diversity class actions in the federal courts.

fundamental fairness to require Phillips to pay interest on additional royalties prior to the time that they became legally due and payable. The Kansas Supreme Court concedes that the additional royalties were not due and payable until after FPC Opinion 586 became final. This should be the controlling factor in the award of interest. Phillips should not be penalized for the delay by the FPC in ruling on Phillips' price increase applications.

I. THE KANSAS COURT ERRED IN HOLDING THAT NONRESIDENT PLAINTIFF CLASS MEMBERS, HAVING NO CONTACT WITH KANSAS, WERE SUBJECT TO THE JURISDICTION OF KANSAS STATE COURTS

A. It is a Violation of the Due Process Clause of the Fourteenth Amendment and Prior Decisions of this Court for a State Court to Use a Standard Other than "Minimum Contacts" in Assuming Personal Jurisdiction Over Nonresident Parties.

Since a judgment in a class action in Kansas binds the class whether favorable or unfavorable to the class, K.S.A. 60-223(c)(2), the existence of jurisdiction must be tested in the context of a judgment *unfavorable* to the class. If the rule were otherwise, a judgment favorable to Phillips would not be accorded full faith and credit. *Hanson v. Denckla*, 357 U.S. 235 (1958). Due process would thus be denied Phillips.

International Shoe Co. v. Washington, 326 U.S. 310 (1945), held that a judgment cannot be entered against one who has no contacts with the forum state:

Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judg-

ment *in personam* against an individual or corporate defendant with which the state has no contacts, ties or relations. (326 U.S. at 319)

This rule recently has been extended by the decision in *Shaffer v. Heitner*, — U.S. —, 97 S.Ct. 2569 (1977). There, this Court said:

The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum contacts standard elucidated in *International Shoe*. (97 S.Ct. at 2582)

The crucial holding by the Kansas Supreme Court with respect to the extension of state jurisdiction is as follows:

Therefore, while the essential element necessary to establish jurisdiction over nonresident defendants is some "minimum contacts" between the defendant and the forum state, *the element necessary to the exercise of jurisdiction over nonresident plaintiff class members is procedural due process.* (App. 37a-38a, 567 P.2d at 1305) (emphasis in original)

The Kansas Supreme Court clearly disregarded the minimum contacts requirement for the assumption of jurisdiction over nonresident plaintiffs. Thus the Kansas Supreme Court created an erroneous distinction between plaintiffs and defendants which this Court never before has recognized. *Shaffer v. Heitner* indicates that it is improper to draw such a distinction when determining questions of jurisdiction:

[A]ll assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny. (97 S.Ct. at 2584-85)

Since as noted, judgments in class actions bind the class even if unfavorable, there is no authority or rational basis for the Kansas Supreme Court's disregard of the minimum contact standard required by the Due Process Clause. Substituting "procedural due process" for the "minimum contacts" required by *International Shoe* and *Shaffer* as the foundation of jurisdiction means that the state court can *create* jurisdiction where none exists merely by following certain procedural safeguards. The Kansas Supreme Court, by focusing on notice and adequacy of representation as providing procedural due process and thereby *establishing* jurisdiction, has ignored the mandate of *International Shoe* that it is the "*quality and nature of the activity*" which establishes jurisdiction if due process is otherwise satisfied.*

Phillips does not dispute that a nonresident plaintiff may bring an action against a defendant in any state which can properly assert jurisdiction over the defendant. In that situation, however, the plaintiff must *voluntarily submit himself* to the jurisdiction of the state court by filing his complaint there. He must *purposely avail himself* of the privilege of bringing suit in the forum state, "thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). In the instant action, the only plaintiff who affirmatively submitted himself to the jurisdiction of Kansas courts was the representative party, Shutts. The unnamed nonresident class members took no af-

* The Kansas Supreme Court ignores the rule that jurisdiction must exist before procedural due process becomes an issue. No amount of procedural due process (in the form of notice) can create jurisdiction where none previously existed. See *Shaffer v. Heitner*, *supra*, 97 S.Ct. at 2585, n. 40.

firmative action within the forum state which could invoke the benefits and protections of its laws. Consequently, the Kansas court's effort to assume jurisdiction over the nonresident members of the plaintiff class was void for it was a clear attempt to exercise power in violation of the Due Process Clause.

A finding of minimum contacts with the forum state must be a prerequisite to the assumption of *in personam* jurisdiction over both unnamed nonresident plaintiffs in a class action and defendants.⁷ The Kansas Supreme Court erred in ruling otherwise. There is nothing improper in holding unnamed nonresident plaintiffs in a class action to the same rules of jurisdiction as nonresident defendants. The positions of both are similar. Neither has affirmatively acted to submit himself to the state court's jurisdiction. In a real sense, both are involuntarily "dragged" into court.

B. There is a Conflict of Decisions Among the States on this Important Issue of Jurisdiction.

The confusion among the states on this constitutional issue can only be resolved by a decision from this Court. Contrary to the decision in Kansas, the Supreme Court of Pennsylvania declined to assert jurisdiction over nonresidents, holding that a plaintiff class must be

⁷ This requirement is recognized by the National Conference of Commissioners on Uniform State Laws in Section 6 of their Proposed Uniform Class Action Act. (App. 5a) That section provides for jurisdiction over a class member, either plaintiff or defendant, if "a basis for jurisdiction exists or would exist in a suit *against* the person under the law of this state." (emphasis added) This clearly accepts the constitutional requirement of minimum contacts announced in *International Shoe* for the plaintiff as well as the defendant. See Vestal, *Uniform Class Actions*, 63 A.B.A. Journal 837, 838 (1977).

limited to residents of the forum state "[b]ecause the jurisdiction of the courts of the Commonwealth is territorially limited." The class may only include non-residents "who submit themselves to the jurisdiction of the state courts." *Klemow v. Time Inc.*, 466 Pa. 189, 197 n.15, 352 A.2d 12, 16 n.15, cert. denied, 429 U.S. 828 (1976). The Pennsylvania Court supported its holding with prior decisions of this Court. *Hanson v. Denckla*, 357 U.S. 235 (1958); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Pennoyer v. Neff*, 95 U.S. 714 (1877).

A New Jersey intermediate appellate court, relying on *International Shoe v. Washington*, *supra*, reached the same conclusion, holding that "a state court does not have jurisdiction over, and therefore cannot bind to a judgment, an individual with whom the state has no 'contacts, ties or relations.'" *Feldman v. Bates Mfg. Co.*, 143 N.J. Super. 84, 362 A.2d 1177, 1180 (App. Div. 1976). The court declined to assert jurisdiction over a multistate plaintiff class and correctly distinguished this Court's cases that involved a "common fund" or an overriding state interest in the regulation of the defendant corporation organized in that state. 362 A.2d at 1180-81.

In view of this Court's decisions in *Snyder v. Harris*, 394 U.S. 332 (1969), and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), which limit federal court jurisdiction in diversity class actions, it is apparent that nationwide class actions will increasingly be brought in state courts. Therefore, it is essential that this Court set the appropriate bounds of state court jurisdiction in such cases and announce a rule to be applied uniformly throughout the nation.

C. The Kansas Court's Application of a Different Jurisdictional Standard in Class Actions is Contrary to Kansas Statutes, the United States Constitution and Controlling Decisions of this Court.

In attempting to justify the expansion of state court jurisdiction the Kansas Supreme Court held "[t]hat there is indeed a difference between the *jurisdictional standards* governing class actions, and those governing all other actions" (App. 38a, 567 P.2d at 1305), relying on the following dicta in *Hansberry v. Lee*, 311 U.S. 32, 41 (1940):

Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction. . . .

The authorities cited by the Kansas Supreme Court in support of this statement, *e.g.*, *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), were all actions where either the nonresident class members had minimum contacts with the forum state as required by *International Shoe*, or where the forum state had undisputed jurisdiction over property in which the non-residents were interested. When viewed in the context of the authorities cited, the statement in *Hansberry* that "some are not within the jurisdiction" can only be taken to mean that the plaintiffs were physically outside the territorial limits of the forum state, not that such nonresidents were not properly "subject to" the forum state's jurisdiction. However, the Kansas Supreme Court misconstrues *Hansberry v. Lee* as providing authority for exercising jurisdiction over persons who were not otherwise "subject to" the forum state's jurisdiction. The suggestion that *Hansberry v.*

Lee provides a different jurisdictional standard for representative actions does not bear analysis.⁸

The Kansas Supreme Court's attempt to expand the jurisdiction of Kansas state courts because the form of the action is a class action runs afoul of the statutes of Kansas. In the first place, K.S.A. 60-266 clearly provides that "[t]his article shall not be construed to extend or limit the jurisdiction of the district courts. . . ." A similar attempt to expand federal court jurisdiction because of Rule 23, Federal Rules of Civil Pro-

⁸ This precise proposition was considered in a thorough article in the U.C.L.A. Law Review:

It might be argued that the jurisdictional standard of due process for representative actions is different than it is for individual actions, especially in light of *Hansberry v. Lee*, in which the Court recognized an exception to the traditional requirement of absolute judicial power over the parties involved in a class action. *Hansberry* made it clear that for a class member to be bound by a court's decree in a representative action, he must be adequately represented by other members of the class. It might be maintained that if a class member is well represented, he cannot claim that he is not bound by the judgment of the adjudicating court, even if he is not a resident of the forum state. However, the effect of *Hansberry* cannot be drawn with such a broad brush, for it was not a class action case and "its broad pronouncements of the requirements of due process in class actions are rank dicta." Also, the exception of *Hansberry* goes to the ability of the court to render a binding judgment on resident class members not actually before the court, and perhaps even to those who have not had notice of the proceedings, but it does not sanction the use by state courts of jurisdictional power unknown to any form of action to affect the legal relations of nonresidents. Neither *Hansberry*, nor any subsequent case, has held that a class action based on separate and distinct claims can have a binding effect on members of the class who are outside the commonly accepted jurisdictional limits of the state court which renders the judgment. Hence, the jurisdictional reach of a state court is the same whether the action is representative or individual. Comment *Class Action Adjudications*, 18 U.C.L.A. L. Rev. 1002, 1011 (1971) (emphasis supplied).

cedure, was specifically rejected in *Snyder v. Harris*, 394 U.S. 332, 337 (1969). Furthermore, there is no hint in the class action statute itself, K.S.A. 60-223, that the class action device was intended in any way to broaden the Kansas courts' jurisdiction beyond the territorial limits of the state, or in any way to attempt to change (or abridge) the requirements of due process as dictated by *International Shoe* and *Shaffer*.

The authorities cited by the Kansas Supreme Court in an attempt to bolster extraterritorial jurisdiction in class action situations are all distinguishable. *Chance v. Superior Court*, 373 P.2d 849 (1962), clearly was an *in rem* proceeding. *Daar v. Yellow Cab Co.*, 433 P.2d 732 (1967), involved only persons who had traveled in Yellow Cabs in the Los Angeles area which gave rise to their claims. *Horst v. Guy*, 211 N.W. 2d 723 (N.D. 1973), specifically limited the class to residents or former residents of North Dakota. These authorities clearly do not support the court's conclusion. The federal cases, such as *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452 (E.D. Pa. 1968) and *City of Philadelphia v. Morton Salt Co.*, 248 F.Supp. 506 (E.D. Pa. 1965), are completely inapposite because they were cases brought under the antitrust laws of the United States where nationwide jurisdiction is granted by Section 5 of the Sherman Antitrust Act, 15 U.S.C. § 5.

It follows that the Kansas Supreme Court's holding that different jurisdictional standards apply in class action suits is not supported by any authority and is contrary to K.S.A. 60-223 and K.S.A. 60-266. The Kansas Supreme Court has construed K.S.A. 60-223 as expanding state court jurisdiction over nonresidents having no contact with Kansas. This construction

renders K.S.A. 60-223 unconstitutional and violates Phillips' rights under the Due Process Clause of the Fourteenth Amendment.

D. This Case is Not Controlled by Prior "Common Fund" Cases.

The Kansas Supreme Court, apparently sensing that it was distorting legal precedent in extending state court jurisdiction to nonresident class plaintiffs who had no contacts with Kansas, next considered the "common fund" cases which it said were "closely analogous to the case at bar." (App. 47a, 567 P.2d at 1311) Phillips has no quarrel with the "common fund" cases and believes them to be correct holdings in their particular fact situations. However, Phillips strenuously objects to the suggestion by the Kansas Supreme Court that the "common fund" cases are in any way controlling here or even "closely analogous" to the facts in the instant case. This suggestion displays a total lack of understanding by that court of the underlying relationships between Phillips and its royalty owners giving rise to the claims herein.

Under the oil and gas leases Phillips obtains title to the gas when it is produced. Phillips sells gas owned by it to pipeline companies under gas purchase agreements. The royalty owners have no right to any of the gas once it is produced, but only have claims against Phillips for the amount of royalty due under the applicable contracts. The relationship between Phillips and its royalty owners is simply a debtor-creditor relationship with each royalty owner having a separate and distinct claim against Phillips and Phillips having a series of separate and distinct contractual liabilities to its royalty owners.*

* This is the reason, as the Kansas Supreme Court correctly notes, that the royalty owners' claims could not be aggregated for federal

Prior decisions of this Court recognizing the binding effect of class action judgments on nonresident plaintiffs in "common fund" cases do not control the instant case. *E.g.*, *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915); *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531 (1915). Those cases are distinguishable on their facts and rationale. They each involved a single separate fund, maintained by an organization that was chartered under and controlled by state law. Each fund was kept within the forum state and existed by the grace of its laws. No other state's law controlled. Because the funds were finite and exhaustable, inconsistent judgments could have had a destructive effect on the rights of some of the plaintiff class members who had interests in the funds. Thus, this Court recognized the need for unitary adjudication of plaintiffs' rights to the common fund, and the power of the forum state court to decide issues concerning the fund.

The instant action does not involve a common fund controlled solely by a single state's laws. At issue here is whether Phillips should pay interest on the additional royalties due as a result of its separate contractual relation with the individual royalty owners. Since any interest payment which Phillips may be required to make will not come out of a finite or exhaustable fund, correlative rights need not be protected. Contradictory judgments in the several states, some granting and some denying interest, will not impair any mutual rights. In fact each royalty owner's claim can be adjudicated separately without affecting the rights of any others.

court jurisdictional purposes. *Snyder v. Harris*, 394 U.S. 332 (1969).

No single state has an overriding interest in obtaining consistent judgments for parties other than its own residents on the interest question. While Phillips is authorized to do business in Kansas, as it is in Oklahoma and Texas, it is not chartered in Kansas. Rather, it is a Delaware corporation with its principal place of business in Oklahoma. A few of the producing leases involve Kansas lands and may have been executed in Kansas, but Kansas' interest cannot be grounded on the interpretation of contracts executed exclusively in, or involving lands lying solely within, its borders. Although much of the land situated in the FPC's Hugoton-Anadarko rate making area is located in Kansas,¹⁰ the greatest volume of jurisdictional gas production for the period has been from the Texas counties of the rate making area.¹¹ In this case, the "designated area" gas sales which gave rise to the additional royalties took place in one county of Oklahoma and two counties of Texas. Therefore, neither Kansas, nor Oklahoma, nor Texas, nor any other state can allege a compelling interest in adjudicating all of the class members' individual contract claims. It would strain the concept of due process and territorial limitations on jurisdiction to allow a state court to adjudicate claims

¹⁰ The Kansas Supreme Court sought to justify its assumption of jurisdiction by stating that "Kansas has a legitimate interest in adjudicating the common issue herein because Kansas comprises the largest physical area included in the . . . Hugoton-Anadarko area. . . ." (App. 52a, 567 P.2d at 1314-15) This, however, is not an appropriate rationale for the exercise of personal jurisdiction. "[The state] does not acquire that jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation." *Hanson v. Denckla*, 357 U.S. 235, 254 (1958).

¹¹ See FPC Publication S-217, *Sales By Producers of Natural Gas to Interstate Pipeline Companies—1970*, U.S. Government Printing Office, 1972, Table D, pp. XIII-XIV.

of nonresidents who have no contact with the state merely because their claims have issues in common with claims asserted by residents.

Even assuming, under conflict of law rules, that Kansas law alone governed the entire class action, this would not be sufficient to give Kansas courts personal jurisdiction over the nonresident class members. "[W]e have rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute." *Shaffer v. Heitner*, — U.S. —, 97 S.Ct. 2569, 2586 (1977).

E. The Failure of Class Members to Opt Out of the Class Did Not Constitute an Election to Submit Themselves to the Jurisdiction of the Kansas Court.

The Kansas Supreme Court implies that because the class action notice satisfied procedural due process requirements, it also was effective as a device for acquiring jurisdiction. (App. 48a, 567 P.2d at 1313) The rationale for such a conclusion is that by failing to opt out of the plaintiff class, the nonresidents elected to submit themselves to the jurisdiction of the Kansas Court.¹² This theory erroneously presupposes that the trial court had the power (or jurisdiction) to require the nonresident notice recipients to act affirmatively in order to be excluded from the class or, in failing to act, to submit voluntarily to the court's jurisdiction.

¹² According to the notice concerning the pending class action, which Shutts sent to all class members, their right to opt out was not absolute. Rather, it was within the discretion of the District Court to deny exclusion and force any class member to be bound by its final decision, regardless of the member's desire not to submit himself to the jurisdiction of the court. K.S.A. 60-223(c)(2).

The authorities recognize the clear rule that no state law or rule of judicial procedure has any effect of its own force beyond the limits of the sovereignty from which the authority is derived. In the United States, each state constitutes a distinct and independent sovereignty, and consequently the laws of one state do not operate in any other state of their own force.¹³ Just as the laws of every state are subject to territorial limitations, so also is the jurisdiction of the states' courts. A state court's jurisdiction cannot extend beyond the territory belonging to the sovereignty on behalf of which it functions.¹⁴ Thus, the nonresident recipients of the Kansas court's notice *could disregard it with impunity* for the notice was *ineffective* and *void* for want of power and violative of the Due Process Clause of the Fourteenth Amendment.

II. THE KANSAS COURT ERRED IN HOLDING THAT PHILLIPS MUST PAY INTEREST ON THE ADDITIONAL ROYALTIES

The interest issue in this case arises from the pricing provisions in the gas royalty agreements. Just as the price Phillips undertook to pay royalty owners was pegged to the average price of gas sold by Phillips in the "designated area," that "area" price in turn was dependent upon the rates that the FPC allowed Phil-

¹³ *Cook v. Moffat*, 46 U.S. (5 How.) 295, 308 (1847): "It is true, that as between the several States of this Union, their respective . . . laws, like those of foreign States, can have no effect in any forum beyond their respective limits. . . ."

¹⁴ *Huling v. Kaw Valley Railway and Improvement Co.*, 130 U.S. 559, 563 (1889): "[T]he process of the courts of the State . . . have no efficacy beyond their own borders. . . ."; *Freeman v. Alderson*, 119 U.S. 185, 188 (1886): "The laws of the State have no operation outside of its territory, . . . its tribunals cannot send their citation beyond its limits and require parties there domiciled to respond to proceedings against them. . . ."

lips to charge for its gas. That price was not known until long after the gas was produced. The Kansas Supreme Court correctly noted that until such time as the FPC approved Phillips' proposed price increases, or a portion thereof, Phillips was legally entitled to retain the proceeds from its gas sales in the "designated area." The court noted further that under prior federal cases the plaintiff class had no legally enforceable right to obtain royalties on the monies which were collected and held by Phillips subject to possible refund pursuant to Section 4(e) of the Natural Gas Act, 15 U.S.C. § 717c(e). (App. 28a, 567 P.2d at 1299)

It is elementary that interest is not allowed until the principal sum becomes due and payable, unless otherwise provided by contract. *American Iron Co. v. Seaboard Air Line Railway*, 233 U.S. 261, 265 (1914). Here, the contracts do not provide for interest.

Notwithstanding the above rule, the Kansas Supreme Court held that Phillips must pay interest on the additional royalty ultimately found to be due for the period during which the ascertainment of the amount due was delayed by operation of federal law. In so holding, the Kansas Supreme Court ignored the interstate market in which the natural gas was sold and the supremacy of existing federal law and regulations. The award of interest for the period when the final payment of the additional royalty was properly delayed by operation of federal law so offends notions of fairness as to be violative of the Due Process Clause.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

**Sections 60-223 and 60-266 of the Kansas Statutes Annotated
Provide:**

60-223. Class actions. (a) *Prerequisites to a class action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class actions maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) The interest of members of the class in prosecuting or defending separate

actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against members of the class; (C) the appropriate place for maintaining, and the procedural measures which may be needed in conducting, a class action.

(c) Determination by order whether class action to be maintained; judgment; actions conducted partially as class actions.

(1) As soon as practicable after the commencement and before the decision on the merits of an action brought as a class action, the court shall determine by order whether it is to be maintained as such. Where necessary for the protection of a party or of absent persons, the court, upon motion or on its own initiative at any time before the decision on the merits of an action brought as a nonclass action, may order that it be maintained as a class action. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) The judgment in an action maintained as a class action shall extend by its terms to the members of the class, as defined, whether or not the judgment is favorable to them.

In any class action maintained under subdivision (b) (3), the court shall exclude those members who, by a date to be specified, request exclusion, unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor. To afford members of the class an opportunity to request exclusion, the court shall direct that reasonable notice be given to the class, including specific notice to each member known to be engaged in a separate suit on the same subject matter with the party opposed to the class.

(3) When appropriate (A) an action may be brought or maintained as a class action with respect to particular is-

ues such as the issue of liability, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this section shall then be construed and applied accordingly.

(d) Orders in conduct of actions. In the conduct of actions to which this section applies, the court may, without limitation, make appropriate orders: (1) Settling the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, or to include such allegations, and that the action in either case proceed accordingly. The orders may be combined with an order under K.S.A. 60-216, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or compromise. An action maintained as a class action shall not be dismissed or compromised without the approval of the court, and the court in its discretion may order that notice of a proposed dismissal or compromise be given to the class in such manner as the court may direct.

60-266. Jurisdiction and venue. This article shall not be construed to extend or limit the jurisdiction of the district courts or the venue of actions therein.

Section 4(e) of the Natural Gas Act, 15 U.S.C. § 717c(e). Provides:

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof

to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearings and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

The Proposed Section 6 of the Uniform Class Action Act Reads as Follows:**Section 6. [Jurisdiction over Multi-State Classes.]**

(a) A court of this State may exercise jurisdiction over any person who is a member of the class suing or being sued if:

(1) a basis for jurisdiction exists, or would exist in a suit against the person, under the law of this State;

[(2) the state of residence of the class member has by class action law, similar to subsection (b), made its residence subject to the jurisdiction of the courts of this State in class actions.]

[(b) A resident of this State who is a member of a class suing or being sued in another state is subject to the jurisdiction of that state if it by similar class action law extends reciprocal power to this State.]

IN THE DISTRICT COURT OF KIOWA COUNTY, KANSAS

No. 5309

IRL SHUTTS, as Executor of the estate of Althea Shutts,
individually and as representative of all that class of
gas royalty owners under Phillips Petroleum Company
oil and gas leases in the Hugoton-Anadarko Area,
Plaintiff,

vs.

PHILLIPS PETROLEUM COMPANY, *Defendant.*

(JULY 29, 1976)

FINDINGS OF FACT

The stipulations in the pre-trial order provide adequately for the findings of fact necessary to present the issues herein and are adopted by the court by reference as its findings of fact herein.

Also, the contention of the parties are set forth in the pre-trial order in at least sufficient length and are also adopted by reference.

CONCLUSIONS OF LAW

1. This is a proper class action under the provisions of K.S.A. Supp. 60-223 because:

(a) The approximately 6400 royalty owners in the Hugoton-Anadarko area makes joinder impracticable;

(b) Any interest due each member of the class is too small to justify separate actions;

(c) Questions of fact and law are common to all members in that the facts are really undisputed and the sole legal issue presented is whether the plaintiff members are entitled to interest on the suspended royalties held by defendant;

(d) The claims of the named parties are typical of the claims of all members of the class and will fairly and adequately protect the interest of the class;

(e) The question presented common to all members of the class predominate over any individual question and a class action is not only superior but the only efficient manner to adjudicate the dispute herein (to avoid multiple suits and excessive expenses) and that this court having jurisdiction of a large physical portion of the Hugoton-Anadarko area is a convenient forum for such action.

2. Defendant, in compliance with its contractual duty with its royalty owners, secured the best price obtainable to post bond and agree to the interest back pay provisions to its purchasers or to forfeit the negotiated price increases until final FPC approval.

3. The portion of the increased rates secured under the above paragraph that applied to the royal share of the proceeds was to be paid to royalty owners or to be refunded if not approved by the FPC. This royalty share did not belong to the defendant whether or not the rate was approved by the FPC.

4. The defendant concomitant with its duty to its royalty owners to secure the best price obtainable (under its covenant to market) had the duty to remit the collected share of royalty as promptly as commercially feasible on the same conditions as it was received by defendant or in the alternative to place the funds in a proper investment fund for subsequent disbursement. The fact that FPC permitted and essentially required defendant to post bond and agree to pay back interest if a refund was ordered did not entitle defendant to free use of the royalty owners share of the increased proceeds. The FPC bond and interest pay back requirements certainly justify and permit defendant business use of the increased rates of its own share of those rates but not the royalty owners share which did not belong

to defendant under any eventual ruling by the FPC. See *Phillips Petroleum Co. v. Adams*, 513 F2d 355. The Court therefore concludes that the defendant is liable for interest on royalty proceeds retained by it and used as a business asset by it pending final FPC approval and conclusion of litigation based on its contractual duty to remit royalty proceeds in a reasonably prompt manner. It is specifically not the basis of this decision that such duty arises from an attempt to impose any facet of fiduciary relationship to the defendant.

5. The evidence proffered by plaintiff consisting of the profit and loss statements of defendant and reports relating to economic inflation is excluded and not considered herein. Nor is the FPC regulation requiring interest of the royalty share returned to the purchasers controlling herein. The FPC regulation in point herein did not, and could not for lack of jurisdiction to do so, attempt to regulate the obligation between defendant and members of the plaintiff class herein as to the time or manner or amount of the royalty interests to be paid out of the increased rates.

6. The royalty owners were entitled to rely on defendant to collect the best price obtainable and to represent the royalty owners' interest before the courts and the FPC (as a result of the implied lease covenant.) This does not imply, however, consent for the defendant to use the royalty proceeds as a business asset resulting in the economic gain of interest to defendant to the exclusion of the royalty owners.

7. The acceptance without an accounting as to rates or interest of payment of the suspended royalties herein in December, 1972, did not constitute ratification because there was no basis for the royalty owners to know what was involved in the payment. For the same reason estoppel does not apply to preclude recovery herein.

8. Division orders and unitization orders cannot be construed to modify the lease obligations of the defend-

ant, being instruments reflecting royalty owners interests in proceeds from production and unitization of acreage for allowables respectively. No consideration is reflected in these instruments which would support defendant's contention that these instruments, executed subsequent to the original leases herein, were contracts to modify the royalty provisions of said leases. For the same reasons, the gas royalty agreements do not change defendant's obligations under their original leases except for agreements to the controlled price.

9. Defendants contention that the payment of the additional royalties in December 1972 constituted a "bounty" to plaintiffs is without any foundation and is contrary to said "gas royalty agreements" establishing the FPC approved prices as the basis for royalty payments.

10. To allow defendant free use of the royalty share of production for over ten years as a result of the difficulties and delays caused by the FPC regulations would unjustly enrich defendants. Defendant paid the full royalty share of proceeds collected prior to June 1, 1961, and after October 1, 1970. The decision to withhold the increased (but unapproved) rates in the intervening period was a unilateral decision by defendant that cannot rise to the stature of a defense of ratification. Nor does it support the "bounty" theory of defendant herein as noted above.

11. The statutory rate of interest herein in Kansas, Oklahoma and Texas is six per cent per annum and is allowed as the proper rate of interest to be applied to the suspended royalties herein from time of receipt until date of judgment herein with interest compounded on an annual basis.

12. Excluded from this judgment are those parties who have filed their elections herein to be excluded as members of the Plaintiff Class.

JUDGMENT IS THEREFORE entered for the Plaintiff Class as set forth herein with Defendant ordered to account to the Court as set forth herein for members of Plaintiff Class.

The issue of attorney fees is reserved pending the accounting ordered herein.

DATED July 29, 1976.

/s/ KEATON G. DUCKWORTH
Keaton G. Duckworth
DISTRICT JUDGE

(CAPTION OMITTED IN PRINTING)

Order On Motion

On this 13th day of August, 1976, the post judgment Motion of plaintiff class to alter and supplement the judgment of the Court dated July 29, 1976, comes regularly on for hearing, plaintiff class being represented by Chapin & Penny, Medicine Lodge, Kansas, their attorneys; and defendant being represented by T. L. Cabbage II of Amarillo, Texas, and Joe Kennedy of Wichita, Kansas, its attorneys.

THEREUPON, the Motion is presented to the Court and the Court being well and fully advised in the premises finds and orders as follows:

1) The judgment of the Court entered herein as of July 29, 1976, is a final judgment as to liability of defendant and is appealable prior to the time defendant computes interest as directed therein.

2) From and after July 29, 1976, date of entry of judgment of the Court herein, such judgment shall bear interest at the statutory rate of 8% per annum on interest due and to be accounted for herein as ordered by the Court.

/s/ KEATON G. DUCKWORTH
Keaton G. Duckworth

(CAPTION OMITTED IN PRINTING)

Pretrial Order

On the 26th day of February, 1976, a Pretrial Conference was had in the above-entitled case, plaintiff class being represented by W. Luke Chapin and Gordon Penny of Chapin & Penny, Medicine Lodge, Kansas; and the defendant Phillips Petroleum Company being represented by T. L. Cubbage, II, of Phillips Petroleum Company, P. O. Box 1751, Amarillo, Texas, 79105, and Joseph W. Kennedy, of Morris, Laing, Evans, Brock & Kennedy, Chartered, Suite 430, 200 West Douglas, Wichita, Kansas, 67202.

WHEREUPON, after considering the arguments and stipulations of counsel, the pleadings, depositions, interrogatories, admissions, and exhibits submitted, the Court made the following order:

• • • • •

VI.

STIPULATIONS

A. The parties have agreed to be bound by the following stipulations, subject to introducing such further evidence regarding the same as the parties may deem necessary or desirable:

1. This action was filed by the plaintiff, Irl Shutts, ("Shutts") a resident of Sun City, Barber County, Kansas. Shutts is an owner of gas royalty interests under leases owned or operated by defendant Phillips Petroleum Company ("Phillips") in the Hugoton-Anadarko area as hereinafter defined. Shutts or his predecessor in title, Althea Shutts, received certain of the "FPC suspense money", so called, paid out as royalties by Phillips as hereinafter set forth.

2. This action was filed by Shutts seeking to recover, in behalf of himself and all others of Phillips' gas royalty owners in the Hugoton-Anadarko area, interest, or a share of profits as damages in lieu of interest, on monies withheld by Phillips for a period of years pending approval by the Federal Power Commission ("FPC" or "Commission") of certain rate increases on gas purchases.

3. The Court has ordered that as such royalty owner, plaintiff Shutts is a member of a class of approximately 6,400 royalty owners (less a small number of such royalty owners who have opted-out after having received a notice given by publication and mailing according to order of the Court) who received retained funds paid out as royalties by Phillips as a result of FPC Opinion No. 586, issued September 18, 1970, by the Commission, pertaining to gas rates in the Hugoton-Anadarko area rate proceedings; such FPC opinion being affirmed in *In Re Hugoton-Anadarko Area Rate Case*, 446 F.2d 974 (July 31, 1972), which became final October 28, 1972.

4. The "Hugoton-Anadarko area" is a rate making area defined by the FPC consisting of all of the State of Kansas and parts of the States of Texas and Oklahoma, being roughly the panhandle sections of Texas and Oklahoma. FPC Regulation § 154.106(g) specifically defines the Hugoton-Anadarko area as follows:

(g) The Hugoton-Anadarko area consists of the State of Kansas, Texas Railroad Commission District No. 10, and the Oklahoma Counties of Cimarron, Texas, Beaver, Harper, Woodward, Ellis, Woods, Alfalfa, Grant, Major, Garfield, Roger Mills, Dewey, Custer, Blaine, Kingfisher, Canadian, Beckham, Washita, Caddo and Grady, and that part of Stephens County lying within T.2N., RS.4 and 5 West.

5. By various orders issued since the United States Supreme Court, on June 7, 1954, decided *Phillips Petroleum Company v. State of Wisconsin, et al.*, 346 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1036, and determined that Phillips, as an independent natural gas producer selling gas to interstate pipeline companies for interstate transportation and resale was a "natural gas company" within the Natural Gas Act, the FPC suspended increases in prices for sales of gas filed by Phillips and permitted such increases to be collected at some date subsequent to the original date proposed by Phillips, only upon Phillips' filing with the Commission a corporate undertaking to refund all or any portion of such increases which the FPC might find not to have been justified.

6. Subsequent to June 7, 1954, Phillips and its subsidiaries sold natural gas, and components of natural gas, which was produced in the Hugoton-Anadarko area. Some, but not all, of the gas being sold by Phillips within the Hugoton-Anadarko area was sold subject to the jurisdiction of the FPC at prices, a portion of which had not been approved by the FPC.

7. The increased sales prices for some, but not all of Phillips' gas sales in the Hugoton-Anadarko area, were collected by Phillips subject to a duty to refund the same to the purchasers in the event the FPC failed to approve the sales prices pursuant to Section 4(e) of the Natural Gas Act, 15 U.S.C.—717c(e), with interest at 7% per annum from the date of receipt until September 18, 1970, and at 8% per annum thereafter until paid out. 18 C.F.R. § 154.102 (c) and FPC Opinion 586, at page 33.

8. Until June 1, 1961, Phillips paid over to its gas royalty owners in the Hugoton-Anadarko area all of their share (approximately 1/8th) of the increased rates being collected by Phillips, as well as their royalty share of firm proceeds from the sale of gas.

9. Beginning June 1, 1961, as a result of a decision of Phillips' management, Phillips began withholding all of its royalty owners' share of increased gas prices unless the royalty owners put up an acceptable indemnity to repay the same with interest if the increased rates were not approved by FPC; and Phillips so notified all of its royalty owners in the Hugoton-Anadarko area.

10. In July, 1961, Phillips gave the following notice to Althea Shutts, and all other members of the class:

"NOTICE

"As you probably know, since June, 1954, all sales of gas to the interstate pipelines have been subject to the control of the Federal Power Commission. Phillips has been successful since that time in securing a number of increases in its contract prices, but these could not be placed into effect until they were approved, after investigation and hearing, by the Federal Power Commission, except by the agreement of Phillips to refund to the purchaser, with appropriate interest, such amounts that are not finally allowed by the Commission. Heretofore, Phillips Petroleum Company has voluntarily computed royalties paid you on the basis of a weighted average price which included total proceeds received in the area, without regard to the possibility of future refunds. This practice can no longer be continued. Effective June 1, 1961, and until further notice, royalties paid you will be computed by excluding that portion of any price being collected subject to refund which exceeds 11¢ per Mcf (presently the maximum area price level for increased rates as recently announced by the Federal Power Commission in its Statement of General Policy). Payment of royalty based on the balance of the sums collected will be made at such time as it is determined that the sums collected are no longer subject to refund.

"Interest owners desiring to receive payments computed currently on the full sums being collected may arrange to do so by furnishing Phillips Petroleum Company acceptable indemnity to cover their proportionate part of any required refunds, plus the required interest.

"PHILLIPS PETROLEUM COMPANY
NATURAL GAS DEPARTMENT
BARTLESVILLE, OKLAHOMA"

11. Seventeen persons or entities (including two trusts, each representing a number of royalty owners) did furnish indemnities acceptable to Phillips and received current payments computed on the full sums being collected subject to refund. These seventeen persons or entities are not class members of the plaintiff class herein.

12. As to all other gas royalty owners to whom Phillips was accounting for royalties, Phillips, while collecting proceeds for the proposed increased rates, withheld and deposited such cash to its general account and commingled it with its other funds from June 1, 1961, to October 1, 1970.

13. On November 27, 1963, the FPC, by its Order Instituting Area Rate Proceedings (Hugoton-Anadarko Area Dockets No. AR 64-1), issued November 27, 1963, published at 28 Fed. Reg. 12645, subsequently reprinted at 30 FPC 1354, consolidated Phillips' pending applications, and those of others, for hearing under the consolidated designation of Dockets No. AR 64-1.

14. On September 18, 1970, the FPC issued Opinion 586, Dockets No. AR 64-1, et al., Hugoton-Anadarko Rate Cases, which established sales prices applicable to gas sales and established refund requirements. The same was published on October 10, 1970, at 35 Fed. Reg. 15986 and republished at 44 F.P.C. 761. The decision of the FPC was

appealed to the United States Court of Appeals for the Ninth Circuit.

15. As of October 1, 1970, Phillips again began paying all of the royalty owners to whom it accounted, royalties including the rate increases, as to current monthly royalties but did not then pay any back royalties on FPC monies previously withheld.

16. On or about November 25, 1970, Phillips sent the following notice to Althea Shutts and all class members:

"NOTICE CONCERNING FEDERAL POWER COMMISSION
OPINION NO. 586 COVERING INTERSTATE SALES OF GAS
PRODUCED FROM THE HUGOTON-ANADARKO AREA:

"Effective as of October 1, 1970, and until further notice, Phillips Petroleum Company is giving effect to the full ceiling rate levels established by the Federal Power Commission in Opinion No. 586. If the check enclosed herewith includes your payment for your interest in properties in the Hugoton-Anadarko Area, you are hereby notified that such payment has been based upon the full ceiling rate levels established by the Opinion.

"If such Opinion should be changed, set aside, or vacated, resulting in a reduction of the rate levels relied upon by Phillips in its calculations, Phillips will expect you to reimburse it in full for any overpayments occasioned thereby. Such recovery may be had, at Phillips' election, by withholding from subsequent payments to you for your interest in oil or gas, or both oil and gas, whether or not produced from the same properties under which the overpayment occurred.

"Your acceptance of the enclosed check will be regarded as evidence of your consent to such recovery.

"PHILLIPS PETROLEUM COMPANY
EXPLORATION & PRODUCTION DEPARTMENT
GAS SETTLEMENTS DIVISION—619 FPB
BARTLESVILLE, OKLAHOMA 74004"

17. The November 25, 1970, notice from Phillips to Althea Shutts and all class members was included with Phillips' royalty settlement check for October, 1970.

18. On July 31, 1972, the Court of Appeals for the Ninth Circuit affirmed Opinion 586 in *California v. Federal Power Commission*, 466 F.2d 974 (9th Cir. 1972), and, as of October 28, 1972, no application for writ of certiorari had been filed by any of the parties to said action.

19. The effect of FPC Opinion No. 586 was to approve the increased rates collected by Phillips from September 1, 1956, to the extent of approximately \$152,000,000.00 in plant sales of gas and approximately \$1,000,000.00 in field or lease sales of gas, and to disapprove rate increases to the extent of approximately \$29,000,000.00 in plant sales of gas and \$73,000.00 in lease sales of gas, the latter amounts being found refundable to the gas purchasers with interest.

20. On or about December 7, 1972, Phillips mailed Mineral Account Check Number 274,352, payable to Althea Shutts, Box 1181, Sun City, Kansas, 67143, in the sum of \$2,831.25, and in due course of mail, said check was received and negotiated by the said payee. On or about the same date Phillips mailed royalty checks to all other members of the class in payment of increased royalties due them by virtue of the finality of FPC Opinion 586.

21. On and after December 7, 1972, Phillips made a payout of approximately \$5,700,000.00 in additional royal-

ties to over 6,400 persons, firms, corporations, and entities (which includes the class as defined by this Court).

22. At the time of the payouts referenced in paragraph 21 above, Phillips sent the following notice to each payee:

NOTICE

"The enclosed check covers payment based upon gas proceeds which have heretofore been held in suspense pending determination by the Federal Power Commission of the just and reasonable rates applicable to the Hugoton-Anadarko Area, and, subsequent to issue of Opinion No. 586 of the Federal Power Commission which determined such rates, pending appeal and judicial finality of said Opinion. The decision of the Circuit Court of Appeals affirming Opinion No. 586 has recently become final.

"Credits to leases for these heretofore suspended sums have been accrued by computer in suspense accounts, pursuant to numerous Federal Power Commission dockets. The detailed monthly prices and lease accrual information cannot, therefore, be reflected in any practicable manner on the enclosed check. The detail of our computations can be audited during regular business hours at our Bartlesville, Oklahoma office.

"PHILLIPS PETROLEUM COMPANY
SETTLEMENTS DIVISION
EXPLORATION & PRODUCTION DEPARTMENT
BARTLESVILLE, OKLAHOMA 74004"

23. At the time of the payouts referenced above in paragraph A.21, Phillips neither paid nor offered to pay any interest for the use of the money nor did Phillips in the notice sent with the check say anything about interest or how long the money had been held or used by Phillips.

24. The approximately \$5,700,000.00 in additional royalties paid out by Phillips on or after December 7, 1973, was accumulated by Phillips over a period of years beginning in 1961 and it "was not segregated in a separate fund; rather, this cash was commingled with the defendant's other money and was identified by defendant through an accounting system, as a separate and distinct account entity, and accrued as an account payable liability on defendant's books." (Answer to Interrogatory No. 10, Paragraph b.) "The proceeds were taken in a normal cash account." (Roberts Deposition Page 52.)

25. The legal rate of interest, if not specified by contract, in Kansas, Texas, and Oklahoma is 6% per annum.

B. The parties also have agreed to be bound by the following stipulations, subject to introducing such further evidence regarding the same as the parties may deem necessary or desirable; PROVIDED HOWEVER, that while Shutts and the plaintiff class agree that the following stipulations are factually correct, they object to their relevancy to any issue material in this action:

1. On July 26, 1937, J. T. Clawson and Nannie Clawson, as Lessors, executed an oil and gas lease, which lease is recorded in Book 211 at page 45 of the Records of Texas County, Oklahoma, covering the East Half (E/2) of Section 31, Township 1 North, Range 17 E.C.M., in Texas County, Oklahoma, wherein the lessee is Cabot Carbon Company.

2. On June 13, 1944, Cabot Carbon Company, as assignor, assigned the above-referenced oil and gas lease of July 26, 1937, to Phillips by an instrument which is recorded in Book 242 at page 444 of the Records of Texas County, Oklahoma.

3. At some time prior to May 1, 1946, Nannie Clawson succeeded to the rights of J. T. Clawson in the above-referenced oil and gas lease of July 26, 1937.

4. On May 1, 1946, Nannie Clawson and Phillips executed an instrument entitled Gas Royalty Agreement, which agreement is recorded in Book 262 at page 311 of the Records of Texas County, Oklahoma.

5. On April 1, 1958, as a remainderman under the Will of John T. Clawson, deceased, and upon the death of Nannie Clawson, Althea Shutts became the owner of a part interest in the above-referenced oil and gas lease of July 26, 1937.

6. On September 14, 1938, Nannie Clawson, as lessor, executed an oil and gas lease, which lease is recorded in Volume 7 at page 48 of the Lease and Contract Records of Hansford County, Texas, covering the East 120 acres of Section 15, in Block No. 1, Grantee Public Free School and the West 360 acres of Section 16, in Block No. 1, Grantee Public Free School and all of Section 37, in Block No. 1, Grantee W. C. Ry. Co., all in Hansford County, Texas, wherein the lessee was Cabot Carbon Company.

7. On November 25, 1938, Nannie Clawson executed an instrument (recorded in Volume 7 at page 52 of the Lease and Contract Records of Hansford County, Texas) amending the above-referenced oil and gas lease of September 14, 1938, so that it would include the East 126.5 acres of Section 15, instead of the East 120 acres only.

8. On August 10, 1944, Cabot Carbon Company, assignor, assigned the oil and gas lease of September 14, 1938, as amended, referenced above, to Phillips by an instrument which is recorded in Volume 11 at page 147 of the Lease and Contract Records of Hansford County, Texas.

9. On May 21, 1946, Nannie Clawson and Phillips executed an instrument entitled Gas Royalty Agreement, which agreement is recorded in Volume 15 at page 407 of the Lease and Contract Records of Hansford County, Texas.

10. On April 1, 1958, as a remainderman under the Will of John T. Clawson, deceased, and upon the death of Nannie Clawson, Althea Shutts became the owner of a part interest in the oil and gas lease of September 14, 1938, as amended, referenced above.

11. On April 1, 1958, the above-referenced Gas Royalty Agreement of May 1, 1946, and the above-referenced Gas Royalty Agreement of May 21, 1946, were in full force and effect.

12. The Gas Royalty Agreement of May 1, 1946 and the Gas Royalty Agreement of May 21, 1946, speak for themselves. Copies of the same are attached to this Pretrial Order as Appendixes I and II, and reference is made to said Appendixes as though the same were copied in full at this point.

13. During her lifetime, neither Althea Shutts nor Phillips terminated either the above-referenced Gas Royalty Agreement of May 1, 1946, or the above-referenced Gas Royalty Agreement of May 21, 1946, and the same remained in full force and effect between April 1, 1958, and the time of Althea Shutts' death.

14. Althea Shutts died on May 15, 1974.

15. At all times relevant to this action, Phillips has operated five gas wells on the two above-referenced leases, said wells being more specifically described as follows:

	Well name	P.P.Co. File No.	Meter No.	Location
(1)	Winfield	45104	56010	Sec. 31
(2)	Logsdon	43168	52722	Sec. 15
(3)	Lighter #1	43168	52721	Sec. 16
(4)	Byrne #1	45390	53408	Sec. 37
(5)	Byrne #2	45390	52809	Sec. 37

and Phillips has produced from said five wells.

16. The leases described above in paragraphs B.1 and B.6 cover lands situated within the Hugoton-Anadarko area as defined above in paragraph A.4.

17. The "designated area" is an area comprising Texas County, Oklahoma and Sherman and Hansford Counties, Texas.

18. At times relevant to this action, Phillips had 19 applications before the FPC requesting permission to increase the prices for sales of gas by Phillips within the "designated area", and other increases outside the "designated area" but within the Hugoton-Anadarko area. In due course, the FPC issued order suspending all of Phillips' rate increase applications and published the suspension orders in the Federal Register.

19. Phillips chose to collect the higher rates subject to possible refund pursuant to Section 4(e) of the Natural Gas Act. Increases in gas sales prices not made effective subject to FPC approval cannot be made retroactive.

20. As to the FPC suspenses monies, FPC regulations required that certain bond or indemnity agreement or agreements be filed by gas producers in order to collect the increased rates. Pursuant to regulations and indemnity agreements duly filed, Phillips did collect the increased rates and agreed to pay any money ordered refunded to gas purchasers back to the gas purchasers together with interest.

21. This action does not involve "firm proceeds", i.e., the proceeds derived from sales of gas within the Hugoton-Anadarko area at prices which were at or below the rate which had already been approved by the FPC. Royalties calculated in relation to such firm proceeds were all paid in a timely manner.

22. On a month-by-month basis, and prior to October 1, 1970, Shutts, Shutts' predecessors in interest, and all class members, received a royalty computed on the basis of the firm proceeds of Phillip's sales in the Hugoton-Anadarko area, i.e., a rate based on sales prices already found just and reasonable by the PFC.

23. On September 20, 1960, the FPC issued its Statement of General Policy, as amended (initially published in 25 Fed. Reg. 9578).

24. That the notice, quoted above in paragraph A.10, to Althea Shutts and all other members of the class was mailed on or about July 28, 1961, and was included with Phillips' royalty settlement check for June, 1961, that was sent by Phillips to all class members.

25. In the due course of mail, Althea Shutts received and negotiated Phillips' check for the June, 1961 royalty settlement. However, neither Althea Shutts nor anyone acting on her behalf contacted Phillips regarding its offer as stated in the above-referenced notice.

26. In the due course of mail, all other class members received and negotiated Phillips' check for the June, 1961 royalty settlement.

27. After July 28, 1961, Althea Shutts did not request Phillips to continue to disburse royalties to her as before, without indemnity to cover those monies subject to possible refund.

28. After July 28, 1961, neither Althea Shutts nor any other class member responded to Phillips' offer in its

notice of July, 1961, and requested that they be allowed to furnish Phillips with acceptable indemnity so that they might be paid otherwise than according to the method outlined in Phillips' July 28, 1961 notice. (Seventeen persons or entities did accept Phillips' offer, and they are not members of the plaintiff class herein.)

IN THE SUPREME COURT OF THE STATE OF KANSAS

JULY TERM, 1977

PRESENT

HON. HAROLD R. FATZER, CHIEF JUSTICE
HON. ALFRED G. SCHROEDER,
HON. ROBERT H. KAUL,
HON. ALEX M. FROMME,
HON. PERRY L. OWSLEY,
HON. DAVID PRAGER,
HON. ROBERT H. MILLER,

JUSTICES.

No. 47,917

IRL SHUTTS, as Executor of the Estate of Althea Shutts, Individually, and as a representative of all that class of gas royalty owners under Phillips Petroleum Company oil and gas leases in the Hugoton-Anadarko area, *Appellee* and *Cross-Appellant*, v. PHILLIPS PETROLEUM COMPANY, *Appellant* and *Cross-Appellee*.

(JULY 11, 1977)

The opinion of the court was delivered by

SCHROEDER, J.: This is a class action suit filed against Phillips Petroleum Company seeking to recover interest on "suspense royalties" attributed to gas produced from leases in the three-state Hugoton-Anadarko area during the nine-year period from June 1961, to October 1970. Phillips Petroleum Company finally paid what it termed "suspense royalties" without interest in December 1972, after the Federal Power Commission (FPC) approved certain of Phillips' pending gas price rate increase applications. The trial court determined (1) the matter could be tried as a class action, (2) the class members had not waived any claim for

interest, (3) that Phillips was liable for interest on a theory of unjust enrichment, and (4) the class should be awarded six percent compound interest. Phillips Petroleum Company has appealed and the class has cross-appealed asserting the points hereinafter considered and determined.

Irl Shutts (plaintiff-appellee and cross-appellant), a resident of Sun City, Kansas, is the executor of the estate of Althea Shutts, and a royalty owner under producing oil and gas leases owned by Phillips Petroleum Company (defendant-appellant and cross-appellee) (hereafter Phillips) in the Hugoton-Anadarko area. Shutts or his predecessor in title, Althea Shutts, received certain of the "FPC suspense money," so-called, paid out as royalties by Phillips as hereinafter set forth. The trial court certified Shutts as a member and proper representative of a class of approximately 6,400 gas royalty owners (less a small number of such royalty owners who have opted-out after having received notice given by publication and mailing according to order of the court) who received retained funds paid out as royalties by Phillips as a result of Federal Power Commission Opinion No. 586, issued September 18, 1970, by the Commission and which became final October 28, 1972, determining the lawful gas rates in the Hugoton-Anadarko area rate proceedings. (*In re Hugoton-Anadarko Area Rate Case*, 466 F.2d 974 [9th Cir. 1972].)

During her lifetime, Althea Shutts, a resident of Kansas, owned one-seventh (1/7) of the lessor's interest in two oil and gas leases covering lands in Oklahoma and Texas. These leases were within the Federal Power Commission's rate-making area known as the "Hugoton-Anadarko area" which encompasses all of the State of Kansas and the panhandle sections of Texas and Oklahoma. (See 18 C.F.R. § 154.106[g].) The lessee's interest in Althea Shutts' two leases was owned by Phillips Petroleum Company which operated five producing gas wells.

On each of these two leases, Althea Shutts' predecessor in title had entered into a *gas royalty agreement* with Phillips which has remained in full force and effect and which provides that the royalty paid to the lessor shall be computed in relation to the weighted average price per Mcf *received* by Phillips during any calendar month from all sales of gas delivered by Phillips within a certain "designated area."

On June 7, 1954, in *Phillips Petroleum Co. v. Wisconsin*, 347

U.S. 672, 98 L.Ed. 1035, 74 S.Ct. 794, it was determined that Phillips, as an independent natural gas producer selling gas to interstate pipeline companies for interstate transportation and resale, was a "natural gas company" within the Natural Gas Act. (15 U.S.C. § 717, *et seq.*) Accordingly, such sales of gas by Phillips were subject to regulation by the Federal Power Commission (hereafter FPC). By various orders issued since that decision, the FPC *has suspended increases in prices for sales of gas by Phillips and has permitted such increases to be collected at some date subsequent to the original date proposed by Phillips, only upon Phillips' filing with the Commission a corporate undertaking to refund any or all portions of such increase which the FPC might find not to have been justified.* This corporate undertaking cost Phillips nothing to obtain. *Phillips chose to collect the higher rate, subject to possible refund, because increases in gas sales prices not made effective subject to FPC approval could not be made retroactive. Phillips filed the required corporate undertaking to refund the "FPC suspense money."*

After June 7, 1954, Phillips sold gas in the "designated area" and throughout the Hugoton-Anadarko area. Some of this gas was sold subject to the FPC jurisdiction at prices which had not been approved by the FPC. *The increased prices for some, but not all, of Phillips' gas sales in the "designated area" and the Hugoton-Anadarko area were collected by Phillips subject to a duty to refund the same to the gas purchasers in the event the FPC failed to approve the sales prices pursuant to Section 4(e) of the Natural Gas Act, 15 U.S.C. § 717c(e), with interest at seven percent (7%) per annum from the date of receipt until September 18, 1970, and eight percent (8%) per annum thereafter until paid out, if the FPC did not approve the sales price.* (18 C.F.R. § 154.102[c] and FPC Opinion No. 586, p. 33.) Until such time as the FPC approved such increased sales prices, or a portion of such prices, Phillips was entitled to retain the proceeds from such sales under federal cases holding that the royalty owners had no legally enforceable right to obtain such monies held by Phillips subject to refund. (See *Ashland Oil & Refining Company v. Staats, Inc.*, 271 F. Supp. 571, 579 [D. Kan. 1967]; and *Boutte v. Chevron Oil Company*, 316 F. Supp. 524 [E.D. La. 1970], *aff'd* 442 F.2d 1337 [5th Cir. 1971].)

Until June 1, 1961, Phillips in its monthly payments to its gas

royalty owners in the Hugoton-Anadarko area paid all of their share of the increased rates being collected by Phillips subject to refund, as well as their share of proceeds from the sale of gas which were not subject to refund, the so-called "firm" proceeds. *Beginning June 1, 1961, Phillips' management decided to begin withholding all of its royalty owners' share of increased gas prices subject to refund, unless the royalty owners put up an acceptable indemnity to repay the same with interest if the increased prices were not approved by the FPC.*

In July 1961, Phillips gave the following notice to Althea Shutts and all other royalty owners in the Hugoton-Anadarko area:

"NOTICE

"As you probably know, since June, 1954, all sales of gas to the interstate pipelines have been subject to the control of the Federal Power Commission. Phillips has been successful since that time in securing a number of increases in its contract prices, but these could not be placed into effect until they were approved, after investigation and hearing, by the Federal Power Commission, *except by the agreement of Phillips to refund to the purchaser, with appropriate interest, such amounts that are not finally allowed by the Commission.* Heretofore, Phillips Petroleum Company has voluntarily computed royalties paid you on the basis of a weighted average price which included total proceeds received in the area, without regard to the possibility of future refunds. This practice can no longer be continued. Effective June 1, 1961, and until further notice, royalties paid you will be computed by excluding that portion of any price being collected subject to refund which exceeds 11 [cents] per Mcf (presently the maximum area price level for increased rates as recently announced by the Federal Power Commission in its Statement of General Policy). Payment of royalty based on the balance of the sums collected will be made at such time as it is determined that the sums collected are no longer subject to refund.

"Interest owners desiring to receive payments computed currently on the full sums being collected may arrange to do so by furnishing Phillips Petroleum Company acceptable indemnity to cover their proportionate part of any required refunds, plus the required interest.

"PHILLIPS PETROLEUM COMPANY
NATURAL GAS DEPARTMENT
BARTLESVILLE, OKLAHOMA"

(Emphasis added.)

The indemnity which Phillips required was not a no-cost corporate undertaking, which was all Phillips filed with the FPC. Rather, Phillips required a corporate surety bond in an amount based on estimated production for two years, *plus seven percent (7%) interest*, subject to Phillips' review at the end of eighteen (18) months.

This notice was included with Phillips' royalty checks for June 1961, that were mailed to all its royalty owners on July 28, 1961. Seventeen (17) persons or entities (who are not members of this class action) did furnish indemnities acceptable to Phillips and received current payments computed on the full sums being collected, including amounts subject to refund. However, none of the approximately 6,400 class members responded to Phillips' offer contained in the notice, or requested that they be allowed to furnish Phillips with acceptable indemnity, so that they might be paid otherwise than according to the method outlined in Phillips' July 28, 1961, notice.

At various times after May 20, 1960, Phillips had nineteen (19) applications before the FPC requesting permission to increase the price for sales of gas by it within the "designated area." In due course the FPC issued orders suspending the nineteen (19) rate increase applications. On November 27, 1963, the FPC consolidated the applications of Phillips and others for hearing in the Hugoton-Anadarko area rate proceeding.

From June 1, 1961, to October 1, 1970, Phillips deposited the increased rate monies collected *in its general account and commingled it with its other funds*, without ever giving notice of this fact to royalty owners during the time it was holding money. It is important to note that during this period of time *Phillips had no entitlement to the gas royalty owners' share of the "suspense royalties," whether or not the rates were approved by the FPC.* Phillips never owned this money. While Phillips collected eight-eighths (8/8) of the increased rates, under no condition was the one-eighth (1/8) of the increase attributable to the royalty owners ever to go to Phillips. That royalty share, according to eventual FPC ruling, was either to go to Phillips' royalty owners, or back to Phillips' gas purchasers with interest, or part to one and part to the other.

On September 18, 1970, the FPC issued Opinion No. 586 in the Hugoton-Anadarko rate cases which established sales prices applicable to the gas sales and refund requirements. The order was made effective October 1, 1970. (See 44 FPC 761 and 35 Fed. Reg. 15,986 [1970].) The effect of FPC Opinion No. 586 was to approve the increased rates collected by Phillips from September 1, 1956, to the extent of approximately \$152,000,000 in plant sales of gas and approximately \$1,000,000 in field or lease sales of gas,

and to disapprove rate increases to the extent of approximately \$29,000,000 in plant sales of gas and \$73,000 in lease sales of gas, the latter amounts being found refundable to the gas purchasers with interest.

However, the FPC had no jurisdiction over landowner royalty interests relating to the sale of gas, and it undertook to make no ruling with reference to whether any interest or compensation was payable by the producers to the royalty owners for "suspense royalties" held by Phillips.

As of October 1, 1970, Phillips again began paying all of the royalty owners, to whom it accounted, royalties including the rate increases as to current monthly royalties, but Phillips did not then pay any back "suspense royalties" on monies previously withheld. On or about November 25, 1970, Phillips sent the following notice to Althea Shutts and other royalty owners in the class:

"NOTICE CONCERNING FEDERAL POWER COMMISSION OPINION NO. 586 COVERING INTERSTATE SALES OF GAS PRODUCED FROM THE HUGOTON-ANADARKO AREA:

"Effective as of October 1, 1970, and until further notice, Phillips Petroleum Company is giving effect to the full ceiling rate levels established by the Federal Power Commission in Opinion No. 586. If the check enclosed herewith includes payment for your interest in properties in the Hugoton-Anadarko Area, you are hereby notified that such payment has been based upon the full ceiling rate levels established by the Opinion.

"If such Opinion should be changed, set aside, or vacated, resulting in a reduction of the rate levels relied upon by Phillips in its calculations, Phillips will expect you to reimburse it in full for any overpayments occasioned thereby. Such recovery may be had, at Phillips' election, by withholding from subsequent payments to you for your interest in oil or gas, or both oil and gas, whether or not produced from the same properties under which the overpayment occurred.

"Your acceptance of the enclosed check will be regarded as evidence of your consent to such recovery.

**"PHILLIPS PETROLEUM COMPANY
EXPLORATION & PRODUCTION DEPARTMENT
GAS SETTLEMENTS DIVISION - 619 FPB
BARTLESVILLE, OKLAHOMA 74004"**

The foregoing notice from Phillips to Althea Shutts and all class members was included with Phillips' royalty checks for October 1970.

Litigation regarding FPC Opinion No. 586 continued until July 31, 1972, when the Ninth Circuit Court of Appeals affirmed the FPC opinion. When no appeal was taken, the opinion became

final on October 28, 1972. (See *In re Hugoton-Anadarko Area Rate Case*, supra.)

On or about December 7, 1972, Phillips mailed royalty checks to royalty owners in payment of the increased royalties due them by virtue of the finality of FPC Opinion No. 586. Phillips paid Althea Shutts the sum of \$2,831.25, and paid out approximately \$5,700,000 in additional royalties to over 6,400 persons, firms, corporations and entities (which includes the class as defined by the trial court). Only 218 of these persons were residents of Kansas. Of that number only 128 had executed gas royalty agreements of the type under which Althea Shutts' royalty was paid. (See Phillips' July 1961, notice to *all* of its royalty owners in the Hugoton-Anadarko area heretofore quoted as stipulated by the parties herein.) The record is barren as to the number in the plaintiff class residing in other states who have gas leases with Phillips covering land in Kansas, which encompasses the largest portion of the Hugoton-Anadarko area.

At the time of these payouts, Phillips sent the following notice to each payee:

"NOTICE

"The enclosed check covers payment based upon gas proceeds which have heretofore been held in suspense pending determination by the Federal Power Commission of the just and reasonable rates applicable to the Hugoton-Anadarko Area, and, subsequent to issue of Opinion No. 586 of the Federal Power Commission which determined such rates, pending appeal and judicial finality of said Opinion. The decision of the Circuit Court of Appeals affirming Opinion No. 586 has recently become final.

"Credits to leases for these heretofore suspended sums have been accrued by computer in suspense accounts, pursuant to numerous Federal Power Commission dockets. The detailed monthly prices and lease accrual information cannot, therefore, be reflected in any practicable manner on the enclosed check. The detail of our computations can be audited during regular business hours at our Bartlesville, Oklahoma office.

**"PHILLIPS PETROLEUM COMPANY
SETTLEMENTS DIVISION
EXPLORATION & PRODUCTION DEPARTMENT
BARTLESVILLE, OKLAHOMA 74004"**

(Emphasis added.)

The foregoing notice discloses Phillips neither paid nor offered to pay any interest for the use of the money, nor did Phillips say anything about interest or how long the money had been held or used by Phillips.

Althea Shutts accepted the payment for increased royalties

before she died on May 15, 1974. On September 16, 1974, Irl Shutts filed this action. Shutts, as a representative of approximately 6,400 royalty owners, claimed approximately \$1,000 interest for himself and interest for the members of the class on the amount ultimately paid to the royalty owners which have heretofore been denominated "suspense royalties."

On November 26, 1974, Shutts filed a motion to certify the action as a class action. On May 1, 1975, Judge Robert M. Baker granted Shutts' motion for a class order under K.S.A. 60-223 and ordered notice to be given to all gas royalty owners in the Hugoton-Anadarko area, regardless of whether such leases covered land in Kansas, Texas or Oklahoma. Phillips' request to take an interlocutory appeal was denied.

Shutts prepared notices which were distributed by Phillips during a monthly royalty payment mailing to all royalty owners in the Hugoton-Anadarko area then receiving royalties from Phillips. After setting forth the facts surrounding the lawsuit, the notice provided:

"1. The court will include as members of the plaintiff class herein all of the gas royalty owners addressed above; provided, however, any person or concern so included may by filing a written request to the Clerk of the District Court of Kiowa County, Kansas, Greensburg, Kansas, 67054, on or before the 30th day of April, 1976 [original notice specified July 15, 1975] be excluded from the class unless upon notice and after hearing and for stated reasons the court finds that inclusion is essential to the fair and efficient adjudication of the controversy. Any class member, if he so desires, may appear in the case in person or through his own counsel; otherwise, plaintiff's counsel will represent him as a member of plaintiff class.

"2. Judgment in this action, whether for the plaintiff class or for the defendant, will be binding on all class members except those who may be excluded as above stated. Class members excluded will not be entitled to share in the benefit of any judgment or settlement entered or concluded favorable to plaintiff class.

"3. Plaintiffs' attorneys' fees are contingent on recovery. If the plaintiffs are successful, the court will allow a reasonable attorneys' fee for plaintiffs' attorneys out of the interest fund created. If plaintiffs are unsuccessful, there will be no allowance of attorneys' fees."

Notices were also published in seven area newspapers and sent by first class mail by the plaintiff to former royalty owners. Judge Baker later disqualified himself, and Judge Duckworth was eventually assigned to this case.

On August 12, 1975, three Texas residents mailed a notice to the clerk of the district court saying they did not wish to par-

ticipate in this class action suit. Because this notice was not timely filed and because a multiplicity of suits could occur if exclusion was granted, the trial court sustained Phillips' motion to deny the exclusion.

The trial court adopted by reference the stipulations of the parties set forth in the pretrial order as its findings of fact and concluded (1) the matter could be tried as a class action, (2) the class members had not waived any claim for interest, (3) that Phillips was liable for interest on a theory of unjust enrichment, and (4) the class should be awarded six percent compound interest. Specifically, the trial court determined in its conclusions of law:

- "1. This is a proper class action under the provisions of K.S.A. Supp. 60-223 because:
 - (a) The approximately 6400 royalty owners in the Hugoton-Anadarko area makes joinder impracticable; [sic]
 - (b) Any interest due each member of the class is too small to justify separate actions;
 - (c) Questions of fact and law are common to all members in that *the facts are really undisputed and the sole legal issue presented is whether the plaintiff members are entitled to interest on the suspended royalties held by defendant;*
 - (d) The claims of the named parties herein are typical of the claims of all members of the class and will fairly and adequately protect the interest of the class;
 - (e) The question presented common to all members of the class predominates over any individual question and a class action is not only superior but the only efficient manner to adjudicate the dispute herein (to avoid multiple suits and excessive expenses) *and that this court having jurisdiction of a large physical portion of the Hugoton-Anadarko area is a convenient forum for such action.*

- "4. The defendant concomitant with its duty to its royalty owners to secure the best price obtainable (under its covenant to market) had the duty to remit the collected share of royalty as promptly as commercially feasible [sic] on the same conditions as it was received by defendant or in the alternative to place the funds in a proper investment fund for subsequent disbursement. The fact that FPC permitted and essentially required defendant to post bond and agree to pay back interest if a refund was ordered did not entitle defendant to free use of the royalty owners share of the increased proceeds. The FPC bond and interest pay back requirements certainly justify and permit defendant business use of the increased rates of its own share of those rates but not the royalty owners share which did not belong to defendant under any eventual ruling by the FPC. See *Phillips Petroleum Co. v. Adams*, 513 F2d 355. The Court therefore concludes that the defendant is liable for interest on royalty proceeds retained by it and used as a

business asset by it pending final FPC approval and conclusion of litigation based on its contractual duty to remit royalty proceeds in a reasonably prompt manner. It is specifically not the basis of this decision that such duty arises from an attempt to impose any facet of fiduciary relationship to the defendant.

- "7. The acceptance without an accounting as to rates or interest of payment of the suspended royalties herein in December, 1972, did not constitute ratification because there was no basis for the royalty owners to know what was involved in the payment. For the same reason estoppel does not apply to preclude recovery herein.

- "8. Division orders and unitization orders cannot be construed to modify the lease obligations of the defendant, being instruments reflecting royalty owners interests in proceeds from production and unitization of acreage for allowables respectively. No consideration is reflected in these instruments which would support defendant's contention that these instruments, executed subsequent to the original leases herein, were contracts to modify the royalty provisions of said leases. For the same reasons, the gas royalty agreements do not change defendant's obligations under their original leases except for agreements to the controlled price.

- "9. Defendant's contention that the payment of the additional royalties in December 1972 constituted a 'bounty' to plaintiffs is without any foundation and is contrary to said 'gas royalty agreements' establishing the FPC approved prices as the basis for royalty payments.

- "10. To allow defendant free use of the royalty share of production for over ten years as a result of the difficulties and delays caused by the FPC regulations would unjustly enrich defendants. Defendant paid the full royalty share of proceeds collected prior to June 1, 1961, and after October 1, 1970. The decision to withhold the increased (but unapproved) rates in the intervening period was a unilateral decision by defendant that cannot rise to the stature of a defense of ratification. Nor does it support the 'bounty' theory of defendant herein as noted above.

- "11. The statutory rate of interest herein in Kansas, Oklahoma and Texas is six per cent per annum and is allowed as the proper rate of interest to be applied to the suspended royalties herein from time of receipt until date of judgment herein with interest compounded on an annual basis." (Emphasis added.)

Appeal has been duly perfected by Phillips, and a cross-appeal has been taken challenging the amount of interest awarded by the trial court.

The appellant contends the trial court erred in holding that it had jurisdiction over *in personam* claims of unnamed nonresident class plaintiffs having no contact with the State of Kansas.

Here the representative of the *plaintiff class* is a resident of Kansas. The named defendant does business in Kansas, and has been duly served with process in Kansas. No question is asserted on this appeal as to the jurisdiction of the trial court over the defendant or the trial court's power to enforce a judgment against

the defendant. Two hundred and eighteen *plaintiff class members* are Kansas residents, and an unknown number of the plaintiff members, many of whom reside in other states, have gas leases with Phillips covering Kansas lands. But it must be conceded some gas leases or other contracts entered into between Phillips and the gas royalty owners in the plaintiff class involve persons who are not residents of Kansas or persons who have gas leases covering land which is outside the physical boundaries of Kansas or both.

It is a basic rule of law that for a person to be bound by a state court's judgment affecting his legal rights, he must be subject to the adjudicating court's jurisdiction. The question presented is how can a Kansas court assert jurisdiction in a *plaintiff class action*, where some of the individual plaintiff class members do not reside in Kansas and do not have land in Kansas covered by leases with Phillips.

It is apparent the multistate class action filed herein presents a novel issue in terms of *in personam* jurisdiction. However, while multistate class actions are novel, state courts have long been confronted with actions brought against nonresident defendants. Out of these cases have developed jurisdictional principles which permit courts to assert personal jurisdiction over a foreign defendant or to obtain jurisdiction over the property of a foreign defendant, and in both cases to render a binding judgment.

The basic requirements to subject *defendants* to personal liability were first established in *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565, where the United States Supreme Court held:

" . . . The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse. . . ." (p. 720.)

The ruling in *Pennoyer* was expanded and made more flexible by cases examining the "minimum contacts" necessary to exercise *in personam* jurisdiction over a nonresident defendant. (*Internat. Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154, 161 A.L.R. 1057; and *McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L.Ed.2d 223, 78 S.Ct. 199.) *Pennoyer* was also expanded by *quasi in rem* judgments binding a nonresident defendant by the court's exercise of *in rem* jurisdiction over the

nonresident defendant's property, thereby subjecting the property to the court's jurisdiction. (Note, *Consumer Class Actions with a Multistate Class: A Problem of Jurisdiction*, 25 Hastings L. J. 1411, 1426-1428 [1974].)

Recently, in *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed.2d 1283, 78 S.Ct. 1228, the United States Supreme Court reaffirmed the *Pennoyer* rule in holding that the lower court's exercise of *in personam* jurisdiction over the nonresident defendant was invalid. The United States Supreme Court stated:

" . . . But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. (Citation omitted.) Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a *defendant* may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him. . . ." (p. 251.) (Emphasis added.)

The most recent case of the United States Supreme Court indicating the parameters of *quasi in rem* jurisdiction over nonresident defendants is *Shaffer v. Heitner*, ___ U.S. ___, ___ L.Ed.2d ___, ___ S.Ct. ___ [No. 75-1812, decided June 24, 1977], following *Internat. Shoe Co. v. Washington*, *supra*.

Kansas cases examining and following these jurisdictional requirements over *nonresident defendants* include *Misco-United Supply, Inc. v. Richards of Rockford, Inc.*, 215 Kan. 849, 528 P.2d 1248; *Tilley v. Keller Truck & Implement Corp.*, 200 Kan. 641, 438 P.2d 128; and *Woodring v. Hall*, 200 Kan. 597, 433 P.2d 135.

These cases all deal with nonresident defendants, not nonresident plaintiffs. Whether all *nonresident plaintiffs* in a class action are required to have "minimum contacts" with the forum is a different matter. Because a class action must necessarily proceed in the absence of almost every class member, we hold the residential makeup of the class membership is not controlling. (Note, *Consumer Class Actions with a Multistate Class: A Problem of Jurisdiction*, *supra* at 1432.) What is important is that the nonresident plaintiffs *be given notice and an opportunity to be heard and that their rights be justly protected by adequate representation*. These are the essential requirements of due process, and they must be satisfied in any class action by every court, state or federal, regardless of the residences of the absent class members. Therefore, while the essential element necessary to establish

jurisdiction over nonresident defendants is some "minimum contacts" between the defendant and the forum state, *the element necessary to the exercise of jurisdiction over nonresident plaintiff class members is procedural due process.*

That there is indeed a difference between the *jurisdictional standards* governing class actions, and those governing all other actions, was emphasized long ago by the United States Supreme Court in *Hansberry v. Lee*, 311 U.S. 32, 85 L.Ed. 22, 61 S.Ct. 115, 132 A.L.R. 741. There the court refused to bind a Negro petitioner to a judgment against him, as a member of a class on the basis of earlier litigation, where a false and fraudulent stipulation was entered into. In that case the court noted:

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Pennoyer v. Neff*, 95 U.S. 714; 1 Freeman on Judgments (5th ed.), § 407. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States, R.S. § 905, 28 U.S.C. § 687, prescribe. . . .

"To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it. . . .

" . . . Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all *because some are not within the jurisdiction* or because their whereabouts is unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree. . . ." (pp. 40-42.) (Emphasis added.)

Thus, although the general rule is that only persons subject to a court's jurisdiction are bound by its judgment, there is a recognized exception for suits of a representative character. While the United States Supreme Court conceded that the extent of this exception had not been precisely defined by judicial opinion, it went on to suggest that if a class were adequately represented, its interest would be protected and the court could proceed to a final decree. These pronouncements, although pure dicta, would not have been included in the opinion unless they were intended to state the rule regarding class actions. The opinion also foretells

what is an essential requisite of due process as to absent plaintiff class members, adequate representation. (See *Gray v. Amoco Production Co.*, 1 Kan. App. 2d ___, 564 P.2d 579 [No. 48,385, decided May 20, 1977].)

An examination of the nature of class action suits provides a historical background for this conclusion. Class action suits arose in equity and were known to English chancery practice since the Seventeenth Century. (A. Homburger, *State Class Actions and the Federal Rule*, 71 Colum. L. Rev. 609, 611 [1971]; and H. Hunter, *Georgia Investment Company v. Norman—The Supreme Court Creates a New Form of Class Action for Georgia*, 24 Mercer L. Rev. 447, 448 [1973].)

In the 1853 opinion of *Smith et al v. Swormstedt, et al*, 57 U.S. (16 How.) 288, 14 L.Ed. 942, the United States Supreme Court gave its blessing to the equitable class suit by noting:

"The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest. . . ." (* p. 302.)

In 1938, the Federal Rules of Civil Procedure defined class actions in terms of the abstract nature of the rights involved: the so-called "true" category was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. (See Proposed Rules of Civil Procedure, 39 F.R.D. 69, 98 [1966].)

Because of the unworkability of these classifications, the Federal Rules of Civil Procedure were amended in 1966. It was decided the new rules would allow a judgment to bind all class members unless a member affirmatively "opted out" of the litigation at its commencement. (Fed. R. Civ. P. 23 [c] [3].)

Recently the United States Supreme Court has required plaintiffs to assume the cost of notice in common-question class actions. (*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 40 L.Ed.2d 732, 94 S.Ct. 2140.) The United States Supreme Court has also refused to aggregate class action claims to meet the \$10,000 federal jurisdictional requirements. (*Zahn v. International Paper Co.*, 414 U.S. 291, 38 L.Ed.2d 511, 94 S.Ct. 505; and *Snyder v.*

Harris, 394 U.S. 332, 22 L.Ed.2d 319, 89 S.Ct. 1053, reh. denied 394 U.S. 1025, 23 L.Ed.2d 50, 89 S.Ct. 1622.) While the results are supported by the fear of overloading the federal judicial system and the desire not to judicially expand the constitutionally established jurisdictional limits, these recent United States Supreme Court cases have clearly restricted access to federal courts. This suit, for example, could not be brought in a federal court. Furthermore, the FPC does not have jurisdiction over the matter. If the state courts will not hear the matter, who will grant relief?

If state courts cannot maintain class action suits with nonresident plaintiffs, can the "small man" find legal redress in our modern society which increasingly exposes people to group injuries for which they are individually unable to get adequate legal redress, either because they do not know enough or because such redress is disproportionately expensive? (See A. Homburger, *State Class Actions and the Federal Rule*, 71 Colum. L. Rev. 609, 641-643 [1971].)

The appellant argues this action should be brought in several different state courts. This risks inconsistent adjudications for a class which is otherwise treated alike. Furthermore, the statute of limitations has run in Oklahoma and Texas. The United States Supreme Court has held the commencement of a class action suit tolls the applicable statute of limitations as to all members of the class. (*American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 38 L.Ed.2d 713, 94 S.Ct. 756, reh. denied 415 U.S. 952, 39 L.Ed.2d 568, 94 S.Ct. 1477; and *Eisen v. Carlisle & Jacquelin*, supra.) However, if in this action Kansas is without jurisdiction over class plaintiffs in other states, this action would not toll the statute of limitations in those states.

We examine then the Kansas rules regarding class actions. Our statutes reveal a recognition of the need for permitting actions to be brought by a named plaintiff in a representative capacity. (G.S. 1868, ch. 80, § 38; L. 1909, ch. 182, § 37; R.S. 1923, 60-413; and L. 1963, ch. 303, § 60-223, amended by Supreme Court order dated July 17, 1969.)

In its present form the Kansas Class Action Rule, modeled after the Federal Rule of Civil Procedure 23, is found at K.S.A. 60-223. It gives the prerequisites for a class action as follows:

"(a) *Prerequisites to a class action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so

numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

"(b) *Class actions maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

"(1) The prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

"(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) The interest of members of the class in prosecuting or defending separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against members of the class; (C) the appropriate place for maintaining, and the procedural measures which may be needed in conducting, a class action."

Phillips argues this is not a proper case for class action treatment under K.S.A. 60-223(b)(3) because there are differing questions of law and fact governing the rights which arise under gas leases in three states. Phillips attempts to apply an overly restrictive interpretation of the "commonality" requirement of K.S.A. 60-223(a). (*Gray v. Amoco Production Co.*, supra; *Sommers v. Abraham Lincoln Federal Savings & L. Ass'n*, 66 F.R.D. 581 [E.D. Pa. 1975]; and *Fertig v. Blue Cross of Iowa*, 68 F.R.D. 53 [N.D. Iowa 1974].) However, as explained later in this opinion, there are questions of fact and law common to the plaintiff class. (See *Perlman v. First National Bank of Chicago*, 15 Ill. App.3d 784, 305 N.E.2d 236 [1973], appeal dismissed 60 Ill.2d 529, 331 N.E.2d 65.)

Citations to the venue statutes of Kansas and other states are inapplicable here. (See *United States v. Trucking Employers, Inc.*, 72 F.R.D. 98 [D.D.C. 1976].) First, venue is not a jurisdictional matter, but a procedural one. (*Gray v. Amoco Production Co.*, supra; and 77 Am. Jur.2d, Venue, § 1, p. 832.) Second, this is a transitory action affecting real property only incidentally. Be-

cause this court has *in personam* jurisdiction over the defendant, venue lies in Kiowa County. (*Gray v. Amoco Production Co.*, supra; 20 Am. Jur.2d, Courts, § 121, p. 476-477; and *Farha v. Signal Companies, Inc.*, 216 Kan. 471, 532 P.2d 1330, modified 217 Kan. 43, 535 P.2d 46.) Lastly, if the venue attack is carried to its logical conclusion a class action could not even be maintained in Kansas with Kansas residents because the venue statute would require separate suits in the different counties.

After reviewing K.S.A. 60-223, we hold Kansas courts can exercise jurisdiction over nonresident plaintiffs in a class action if procedural due process guarantees are met. Although no case in Kansas or any other jurisdiction is precisely in point on the factual situation here presented, many courts in cases from other jurisdictions have reached out to bind nonresident plaintiffs.

In *Chance v. Superior Court*, 58 Cal.2d 275, 23 Cal. Rptr. 761, 373 P.2d 849 (1962), the California Supreme Court held a class action to foreclose separate trust deeds securing each of 2,139 notes was proper and did not deny due process to unnamed noteholders, many of whom may not have been California residents, where the class was ascertainable and susceptible to notice, where the virtually identical notes were created in a single transaction as part of a speculative scheme, where all policyholders had common interests in reaching other assets, and where their individual lots were all in one tract which was more valuable as an entity.

In *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 63 Cal. Rptr. 724, 433 P.2d 732 (1967), the plaintiff brought a class action on behalf of himself and all other users of the taxi cab services in the Los Angeles area who were overcharged by Yellow Cab. The California Supreme Court permitted this class action to proceed although some members of the plaintiff class were unknown and may have been residents of other states.

In *Horst v. Guy*, 211 N.W.2d 723 (N.D. 1973), the plaintiff filed a class action to secure payment of a veteran's bonus under the North Dakota Vietnam Conflict Veterans' Adjusted Compensation Act. The appellants claimed a class action was inappropriate because the district court might not have jurisdiction over all class members because some members were outside the state of North Dakota. The North Dakota Supreme Court held:

" . . . [T]he fact that some of the members of the [plaintiff] class may not be

within North Dakota does not remove the jurisdiction of the district court to hear the case as a class action." (p. 727.)

However, there the class was limited to North Dakota residents or former residents who were no longer residents of the state.

Furthermore, the lower federal courts seem to be relatively untroubled by the inclusion of nonresidents in classes represented before them, although federal courts are, in the absence of statute, generally limited in territorial reach of personal jurisdiction to the state in which they sit. (Fed. R. Civ. P. 4[f]; 4 Wright and Miller Federal Practice and Procedure, § 1124 [1969]; Compare *School Dist. of Philadelphia v. Harper & Row Publishers, Inc.*, 267 F. Supp. 1001, 1005 [E.D. Pa. 1967].) While the residential characteristics of a class are seldom discussed by federal courts, it is reasonable to assume from the various factual circumstances giving rise to federal class actions that the court's jurisdiction over the entire class is not affected by the fact some members reside outside the state in which the court sits. (See e.g., *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452 [E.D. Pa. 1968]; and *City of Philadelphia v. Morton Salt Company*, 248 F. Supp. 506 [E.D. Pa. 1965].)

Many commentators agree a state court has the power to bind a nonresident plaintiff class member. Professor Chafee in *Some Problems of Equity* (1950) notes the Restatement of Judgments "gives the court where a class action is properly brought jurisdiction to bind unnamed members, even if not personally within the jurisdiction of the court." He recognizes the usual rules of *res judicata* apply to all representative suits, but agrees that with some limitations the propositions of the Restatement should usually be applied.

Professor Moore in his treatise, 3B Moore's Federal Practice, § 23.11(5), in discussing the 1938 Federal Rule of Civil Procedure 23 indicates:

"The fact that members of the class are beyond the territorial limits of the class suit court is immaterial as to the binding effect of the class suit judgment." (p. 23-2893.)

The Restatement of the Law of Judgments verbalizes the answer to the question of nonresident plaintiff class members without equivocation:

"§ 26. REPRESENTATIVE OR CLASS ACTIONS.

"Where a class action is properly brought by or against members of a class, the

court has jurisdiction by its judgment to make a determination of issues involved in the action which will be binding as *res judicata* upon other members of the class, *although such members are not personally subject to the jurisdiction of the court.*" (p. 118.) (Emphasis added.)

Tentative Draft No. 2 of the Restatement of the Law of Judgments, Second, § 85 (April 15, 1975) states:

"(1) A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of the rules of *res judicata* as though he were a party. A person is represented by a party who is:

"(e) The representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member.

"(2) A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to service of process." (pp. 56-57.)

We are persuaded the view expressed by the foregoing authorities represents the correct rule of law to follow. (Contra, Note, Expanding the Impact of State Court Class Action Adjudications to Provide an Effective Forum for Consumers, 18 UCLA L. Rev. 1002, 1019 [1971]; and Fisch, Notice, Costs, and the Effect of Judgment in Missouri's New Common-Question Class Action, 38 Mo. L. Rev. 173, 209 [1973].)

Phillips suggests a contrary conclusion is dictated by *Klemow v. Time Incorporated*, ___ Pa. ___, 352 A.2d 12 (1976), cert. denied, 429 U.S. 828, 50 L.Ed.2d 91, 97 S.Ct. 86. There the plaintiff filed a class action suit on behalf of both residents and nonresidents of Pennsylvania who subscribed to *Life* magazine seeking to compel continued publication of the magazine. The trial court dismissed the suit but the Pennsylvania Supreme Court, while reversing on other grounds, indicated the class could not encompass nonresident plaintiffs. The court said in a footnote:

"Because the jurisdiction of the courts of the Commonwealth is territorially limited, the class may consist only of Pennsylvania residents. The class may also include non-residents who submit themselves to the jurisdiction of the state courts. (Citations omitted.)" (352 A.2d 16.)

However, the Pennsylvania class action statute, 12 P.S.App. Rules of Civ. Proc. § 2230, reads:

"(a) If persons constituting a class are so numerous as to make it impracticable to join all as parties, any one or more of them who will adequately represent the interest of all may sue or be sued on behalf of all, but *the judgments entered in such*

action shall not impose personal liability upon anyone not a party thereto." (p. 241.) (Emphasis added.)

K.S.A. 60-223(c)(2) provides:

"The judgment in an action maintained as a class action shall extend by its terms to the members of the class, as defined, whether or not the judgment is favorable to them."

It is readily apparent the Pennsylvania statutory language is completely at variance with the Kansas statutory language. The distinction robs *Klemow* of its persuasion in Kansas. (See Donne and Van Horn, Pennsylvania Class Actions: the Future in Light of Recent Restrictions of Federal Access?, 78 Dick. L. Rev. 460, 521-524 [1973].)

In *Feldman v. Bates Manufacturing Co.*, 143 N.J. Super. 84, 362 A.2d 1177 (1976), the court indicated that without "affiliating circumstances" between the forum state and the litigation, such as a "common trust fund," the judgment in a plaintiff class action suit could not bind nonresident class members. It held class action certification was not appropriate since the judgment would not satisfy due process with respect to the nonresidents. There the Bates Manufacturing Corporation had no assets in New Jersey, was not authorized to do business in New Jersey, and the vast majority of its preferred stockholders (plaintiff class members) were nonresidents with no contacts in New Jersey, which had no special interest in adjudicating litigation. However, the court noted Delaware, Bates' domiciliary state, was fully capable of providing a uniform determination of the issues involved. The *Feldman* court also applied the doctrine of *forum non conveniens* which is inapplicable here because the trial court found "this court having jurisdiction of a large physical portion of the Hugoton-Anadarko area is a convenient forum for such action."

Our rejection of the *Klemow* and *Feldman* cases as applied to the facts here presented is aided by the United States Supreme Court approval of *quasi in rem* class actions which included nonresident class members, some of whom were later found to be bound by the class action decisions. These actions involved as the *res*, insurance funds, and their holdings were found to be determinative of issues concerning the same funds in subsequent actions. In these actions, known as the "common fund" cases, the respective courts found that the various plaintiffs were members of the classes, and therefore bound by the judgments of the prior

actions, despite the fact that the prior actions were conducted in states other than those of the plaintiffs' residences.

Thus in *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662, 59 L.Ed. 1165, 35 S.Ct. 692, Ibs, a Minnesota resident who was insured by Hartford was held bound by a prior Connecticut state court judgment rendered against Dresser, a Connecticut resident, and 30 other members of Hartford holding certificates who brought suit "in their own behalf and in behalf of all others similarly situated." Dresser's unsuccessful challenge to Hartford's right to increase the premium assessments against Hartford's 12,000 members was held binding on all policyholders, regardless of residence. The United States Supreme Court stated:

"Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained." . . . (p. 672.)

(See also *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146, 62 L.Ed. 208, 38 S.Ct. 54 [Connecticut judgment binding on Missouri resident].)

In *Carpenter v. Pacific Mutual Life Insurance Co.*, 10 Cal.2d 307, 74 P.2d 761 (1937), aff'd sub nom. *Neblett v. Carpenter*, 305 U.S. 297, 83 L.Ed. 182, 59 S.Ct. 170, reh. denied, 305 U.S. 675, 83 L.Ed. 437, 59 S.Ct. 355, the California Supreme Court, and ultimately the United States Supreme Court, expanded on the binding effect of judgments in insurance cases on nonresident plaintiffs. The courts upheld the right of the California Insurance Commissioner to liquidate and rehabilitate the Pacific Mutual Life Insurance Company, which was insolvent and on the brink of bankruptcy, against the wishes of the plaintiff class of policyholders. Acknowledging the significant state interest in insurance, and relying on *Hartford Life Insurance Co. v. Ibs*, supra, the California state court judgment was held binding on North Carolina, Illinois and Wisconsin residents. (*Taylor v. Insurance Co.*, 214 N.C. 770, 200 S.E. 882 [1939]; *Larson v. Pacific Mutual*

Life Ins. Co., 373 Ill. 614, 27 N.E.2d 458 [1940], cert. denied, 311 U.S. 698, 85 L.Ed. 452, 61 S.Ct. 137; and *Padway v. Pacific Mut. Life Ins. Co. of California*, 42 F. Supp. 569 [E.D. Wis. 1942].)

Taken together, these cases and subsequent actions in the context of giving full faith and credit to the prior decisions of other state courts clearly recognize a class action may be binding on nonresident plaintiffs when a "common fund" is involved and where due process requirements are met. (See also *Royal Arcanum v. Green*, 237 U.S. 531, 59 L.Ed. 1089, 35 S.Ct. 724; *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 65 L.Ed. 673, 41 S.Ct. 338; *Sovereign Camp v. Bolin*, 305 U.S. 66, 83 L.Ed. 45, 59 S.Ct. 35, 119 A.L.R. 478; and *Sam Fox Publishing Co. v. U.S.*, 366 U.S. 683, 6 L.Ed.2d 604, 81 S.Ct. 1309.)

The "common fund" cases, which seem to be universally accepted, are closely analogous to the case at bar. Here Phillips filed a corporate undertaking guaranteeing to refund any or all portions of the "FPC suspense money" with interest which it collected and held pending FPC determination of the lawful gas rates in the Hugoton-Anadarko area rate proceedings. All gas royalty owners had a common concern in the funds attributable to "suspense royalties" held by Phillips. The "suspense royalties" in question never did or could belong to Phillips. If the proposed rates had been disapproved, the money and interest, which Phillips agreed to pay by its corporate undertaking, would have gone to the pipeline companies who purchased the gas from Phillips. If the proposed rates were approved, the "suspense royalties" would go to the gas royalty owners.

Had Phillips put the "suspense royalties" into a common trust fund, separate from its operating funds, to be used solely to pay either the pipeline companies or the gas royalty owners once the FPC ultimately decided the rate increase question, this case would dovetail nicely into the "common fund" cases. Instead Phillips commingled the "suspense royalties" with its other cash and used the "suspense royalties" to fulfill all its business obligations. In this manner the "suspense royalties," which never did or could belong to Phillips, enriched Phillips at the expense of the royalty owners. To hold that Phillips' act of using the money for business purposes, and not putting it into a separate corporate account, takes this case out of the "common fund" category would reward Phillips' action at the expense of innocent gas royalty owners.

In *Perlman v. First National Bank of Chicago*, 15 Ill. App.3d 784, 305 N.E.2d 236 (1973), a class action was brought by bank borrowers who attacked the bank's computation of interest. The defendant bank attacked the class action because there was no common fund. The bank asserted any money which the class members might claim was commingled with other assets. The Illinois court held:

" . . . There seems no basis in law or logic for permitting a class action against an individual who has sequestered all money wrongfully acquired but denying one against an individual who has commingled it with his other assets.

" . . . The liability or wrongdoing creates the fund, and whatever is taken wrongfully constitutes the fund." (pp. 800-801.)

(See also Note, Class Actions in Illinois: A Viable Alternative to Federal Rule 23?, 8 J. Marshall J. Prac. and Proc. 113 [1974].)

Phillips kept accurate records on this matter in the memory bank of its computer and our holding will not unduly burden them.

While the authorities are conflicting on whether a class action may bind nonresident defendants, where a "common fund" may fairly be established, no question should be raised as to the binding effect of a class on nonresident plaintiffs.

Class actions with nonresident plaintiffs may be brought in Kansas only if due process guarantees are met. We now examine our class action statute and the procedures followed to insure that due process was provided.

Initially the query must be whether reasonable notice was given to all class members. The notice provisions of K.S.A. 60-223(c) differ slightly from the federal notice provisions in Federal Procedure Rule No. 23. K.S.A. 60-223(c)(2) reads in part:

" . . . To afford members of the class an opportunity to request exclusion, the court shall direct that reasonable notice be given to the class, including specific notice to each member known to be engaged in a separate suit on the same subject matter with the party opposed to the class."

K.S.A. 60-223(d)(2) reads in part:

"In the conduct of actions to which this section applies, the court may, without limitation, make appropriate orders: . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity

of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action. . . ."

Federal courts have attached particular significance to Rule No. 23's requirement of notice in common question actions due to the finality afforded them. Notice to those whose legal relations are to be affected by a pending action has always been a fundamental requirement of due process. As the United States Supreme Court suggested in *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652, this elementary notion applies even when the interested parties are so numerous that the task of notification is a complex one. In fact, it is *Mullane's* constitutional standard for notice that is incorporated into Rule No. 23: "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," although some suggest Rule No. 23's requirement of notice does not involve constitutional due process. (See *Eisen v. Carlisle & Jacquelin*, supra.) We need not enter into a discussion on this matter because of the notice given in this case.

Here the notice given fully comports with Federal Rule No. 23, K.S.A. 60-223 and any possible constitutional requirements. Phillips has maintained extensive records in connection with the "suspense royalties." *All gas royalty owners and their interests are known.* There are no unnamed or unknown plaintiff class members. The representative plaintiff prepared the notices, quoted earlier, which were distributed by Phillips during a monthly payment mailing to all royalty owners in the Hugoton-Anadarko area then receiving gas royalties. Notices were also sent by first class mail by the plaintiff to former gas royalty owners. Notices were also published in seven area newspapers.

Having Phillips mail the notice during its monthly mailing does not present error here cognizable. This procedure may not comply with the dictates of *Eisen v. Carlisle & Jacquelin*, supra, although that case does note an exception where a fiduciary duty preexisted between the plaintiff and the defendant, as in a shareholder derivative suit.

The record discloses no objection by Phillips at the trial because it was required to mail the notice. It is well settled an issue presented for the first time on appeal will not be considered by this court. (*In re Estate of Barnes*, 218 Kan. 275, 542 P.2d 1004;

and *Landrum v. Taylor*, 217 Kan. 113, 535 P.2d 406.) In view of our favorable decision to the class, which may recover the cost of notification, this renders moot Phillips' appellate objection to mailing notice. (See *Lamb v. United Security Life Company*, 59 F.R.D. 25 [S.D. Iowa 1972]; and *Ostapowicz v. Johnson Bronze Company*, 54 F.R.D. 465 [W.D. Pa. 1972].)

Phillips argues our notice statute which allows a party to "opt-out" of a class action suit cannot be used to "bootstrap" jurisdiction of the court. Suffice it to say the federal rules and our rule regarding class actions are the result of a conscious choice to decide between provisions allowing parties to "opt-out" or "opt-in." A determination was made to follow the "opt-out" procedure to bind the greatest number of people. (See Proposed Rules of Civil Procedure, 39 F.R.D. 69, 105 [1966]; Cohn, The New Federal Rules of Civil Procedure, 54 Geo. L.J. 1204, 1226 [1966]; and Staff Studies Prepared for the National Institute for Consumer Justice on Consumer Class Action, pp. 138, 149 [1972].)

Phillips argues our class action statute does not give the putative class member an absolute right to "opt-out" as does Federal Rule No. 23(c)(2)(A). K.S.A. 60-223(c)(2) provides in pertinent part:

" . . . [T]he court shall exclude those members who, by a date to be specified, request exclusion, unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor. . . ." (Emphasis added.)

Phillips argues by removing the choice of the putative class member to "opt-out" of the class, it was the intent of the rule to apply to persons over whom the court already had jurisdiction. We do not think such a convoluted conclusion logically follows. The language simply gives the court the power to deny exclusion to class members, be they residents or nonresidents of Kansas, whose inclusion is essential to the fair and efficient adjudication of the controversy. However, we need not examine this section in great detail. (See Staff Studies Prepared for the National Institute for Consumer Justice on Consumer Class Action, *supra* at 145-146.)

Here three Texas residents filed an *untimely* request for exclusion. Phillips filed a motion to deny the request for exclusion alleging in part the three men would file a class action suit in Texas. The trial court sustained Phillips' motion. However, an

untimely request for exclusion could be denied under either the federal or Kansas class action statutes without raising constitutional issues.

We hold reasonable notice was given to satisfy jurisdictional and constitutional due process requirements. (*Mullane v. Central Hanover Tr. Co.*, *supra*.)

Second, we must examine the representation accorded the resident and nonresident plaintiffs by the named representative.

K.S.A. 60-223(d) gives the trial court the authority to make appropriate orders as follows:

" . . . (1) Settling the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, or to include such allegations, and that the action in either case proceed accordingly. The orders may be combined with an order under K.S.A. 60-216, and may be altered or amended as may be desirable from time to time."

Furthermore, K.S.A. 60-223(e) insures adequate representation by controlling dismissals or compromises.

Where inadequate representation is established, courts have denied *res judicata* effect to class action judgments. (See *Research Corp. v. Pfister Associated Growers, Inc.*, 301 F. Supp. 497 [N.D. Ill. 1969]; and *Gonzales v. Cassidy*, 474 F.2d 67 [5th Cir. 1973].)

The class action is premised on the theory that members of the class who are not before the court can justly be bound because the self-interest of their representative coincides with the interest of the members of the class and will assure adequate litigation of the common issues. Where the interests of absent class members have not been adequately represented, binding them by the class judgment would seem to offend the requirements of due process. (*Hansberry v. Lee*, *supra*.) Notice to absent members of the class in this regard is particularly important, for it is the greatest single safeguard against inadequate representation. (*Mullane v. Central Hanover Tr. Co.*, *supra* at 314.)

Here we find adequate representation has been accorded the plaintiff class members by their representative through his attor-

neys who have done a superior job in bringing this action and in arguing and briefing the law on this appeal.

We hasten to add, this opinion should not be read as an invitation to file nationwide class action suits in Kansas and overburden our court system. Concepts of manageability in terms of our Kansas class action statute, the nature of the controversy and the relief sought, the interest of Kansas in having the matter determined, and the class size and complexity will have to be applied. (See Note, Consumer Class Actions with a Multistate Class: A Problem of Jurisdiction, *supra* at 1438-1439.) A court should also give careful consideration, as we have attempted to do, to any possible conflict of law problems. When liability is to be determined according to varying and inconsistent state laws, the common question of law or fact prerequisite of K.S.A. 60-223(a)(2) will not be fulfilled.

An excellent example of a *factual situation* in which a trial judge applying our class action statute should deny certification of a class action, where nonresident plaintiff class members are involved, is presented in *Feldman v. Bates Manufacturing Co.*, *supra*.

The manageability of the class action herein is demonstrated in various ways. There are no basic issues of fact, the material facts having been stipulated by the parties and made a part of the pretrial order. The names, addresses and suspense royalty amounts for each of the royalty owners were readily available in Phillips' records. In fact, the class is more manageable with nonresidents of Kansas included because Phillips would be required to take an extra step in separating nonresident royalty owners in its records. *Phillips treated all royalty owners in the Hugoton-Anadarko area alike, regardless of residency, particular lease provisions or royalty agreements.* (See Phillips' notices to royalty owners heretofore quoted as stipulated by the parties herein.) Actually, it would be difficult to imagine a more manageable plaintiff class action.

Kansas has a legitimate interest in adjudicating the common issue herein because Kansas comprises the largest physical area included in the FPC designated Hugoton-Anadarko area where Phillips is doing business and producing gas which it sells in interstate commerce. All of the gas royalty owners in the Hugoton-Anadarko area have leases with Phillips and a common in-

terest in the money collected by Phillips as "suspense royalties" from the sale of gas in the designated area. It was the same FPC regulation that caused and permitted Phillips to collect the "suspense royalties," and the same FPC Opinion No. 586 pursuant to which the "suspense royalties" were paid out to the royalty owners in the area. All of the gas royalty owners in the Hugoton-Anadarko area have a right in common with each other, in the equivalent of a common fund, to claim damages for commingling and use of the "suspense royalties" by Phillips, payable as interest, and they have a contact with Kansas by reason of such common interest.

Phillips contends the members of the class within the court's jurisdiction are not so numerous as to make their joinder impracticable. Phillips argues only 218 class members are Kansas residents and of this number only 128 signed a gas royalty agreement of the same type under which Althea Shutts was paid her money in December of 1972. Phillips does not indicate, nor does the record disclose, how many gas royalty leases covering Kansas land are involved. In view of what has heretofore been said, there is no need to examine this contention. (However, see *Williams v. Humble Oil & Refining Company*, 234 F. Supp. 985 [E.D. La. 1964] [joinder of 76 persons impracticable]; *Fox v. Prudent Resources Trust*, 69 F.R.D. 74 [E.D. Pa. 1975] [joinder 148 limited partners impracticable]; *Sabala v. Western Gillett, Inc.*, 362 F. Supp. 1142 [S.D. Tex. 1973] [class began with 39 and twelve opted-out]; and *Republic Nat. Bank of Dallas v. Denton & Anderson Co.*, 68 F.R.D. 208 [N.D. Tex. 1975].)

Phillips argues this is not a proper class action case under K.S.A. 60-223(b)(1). We think this point is immaterial. The trial court treated it as a K.S.A. 60-223(b)(3) class action, despite its class order finding number four which was relevant to a 60-223(b)(1) class action.

The appellant contends the trial court erred in holding that Phillips had been unjustly enriched by retaining certain increased proceeds of gas sales, subject to refund under appropriate FPC regulations, until final determination by the FPC of the just and lawful rate for such gas sales.

The trial court awarded interest on the grounds of unjust enrichment as reflected in its tenth conclusion of law, heretofore quoted. The doctrine of unjust enrichment prevents one from

profiting or enriching himself at the expense of another contrary to equity. But there must be some specific legal principle or situation which equity has established or recognized to bring a case within the scope of the doctrine. (*Anderson v. Anderson*, 155 Kan. 69, 72, 123 P.2d 315.)

The appellant contends, and we agree, its retention of the suspense royalties pending FPC determination was lawful. (*Ashland Oil & Refining Company v. Staats, Inc.*, 271 F. Supp. 571 [D. Kan. 1967]; *Boutte v. Chevron Oil Company*, 316 F. Supp. 524 [E.D. La. 1970], aff'd 442 F.2d 1337 [5th Cir. 1971]; and *Phillips Petroleum Company v. Adams*, 513 F.2d 355, 361-362 [5th Cir. 1975], cert. denied 423 U.S. 930, 46 L.Ed.2d 259, 96 S.Ct. 281.) However, that does not mean Phillips owes no interest as a result of the long retention of the FPC "suspense royalties." (*Boutte v. Chevron Oil Company*, supra.)

This identical issue was presented in *Lightcap v. Mobil Oil Corporation*, 221 Kan. 448, 562 P.2d 1. (On June 15, 1977, Mr. Justice White of the United States Supreme Court stayed the mandate of this court in that case.) In *Lightcap*, Mobil was paying gas royalties on the basis of old contract rates of 8.74 cents and 7.15 cents per Mcf while collecting increased rates. Mobil and its predecessors made active use of the plaintiffs' monies collected and plaintiffs were deprived of that use. Although this court was not in complete agreement on other aspects of that opinion, it unanimously held:

"Where a party retains and makes actual use of money belonging to another, equitable principles require that it pay interest on the money so retained and used." (Syl. 12.)

As previously indicated the FPC may order Phillips or any other natural gas companies to refund, with interest, the portion of such increased rates or charges found not justified by the FPC. (15 U.S.C. § 717c[e]; and 18 C.F.R. § 154.102[c].) The rate of interest in the event a refund is ordered is presently seven percent (7%) per annum for all rate filings tendered prior to October 10, 1974. (18 C.F.R. § 154.102[c].)

In the case at bar, beginning on June 1, 1961, Phillips withheld the share of the class members of the increased gas prices subject to refund. Thereafter, while the FPC slowly ground out FPC Opinion No. 586, Phillips deposited the increased rate monies in its general accounts and commingled them with other funds

without giving further notice to the royalty owners. *What is significant is these gas royalty suspense monies never did or could belong to Phillips.* If the FPC disapproved the proposed increase rates the pipeline companies (gas purchasers of Phillips) would receive this suspense money *and the interest which Phillips had agreed to pay by its corporate undertaking.* If the FPC approved the proposed increase rate, the "suspense royalties" would go to the gas royalty owners.

Phillips held a sizable amount of money during this period. On or about December 7, 1972, Phillips mailed approximately \$5,700,000 in additional gas royalties due gas royalty owners by virtue of the finality of FPC Opinion No. 586. A case comment on this subject at 54 Tex. L. Rev. 847 (1976) noted:

" . . . Phillips had collected \$7,500,000 in additional proceeds from the Permian Basin area under FPC Op. No. 662 and currently collects \$500,000 per month subject to refund under FPC Op. No. 669, which relates to nationwide rates. Petitioner's Brief for Certiorari at 9, *Phillips Petroleum Co. v. Adams*, 96 S.Ct. 281 (1975). Five major oil companies paid approximately \$4.5 million in suspense money royalties alone (normally one-eighth of the amount paid to lessees) to 16,000 Kansas and Oklahoma owners under the same FPC rate case in *Adams*. Sunday Oklahoman, Jan. 11, 1976, § B, at 2, col. 1. A Kansas state court recently awarded approximately \$1.5 million in interest payments to royalty owners. *Nix v. Northern Natural Gas Producing Co.*, No. 3116 (Dist. Ct. Grant County, Kan., Jan. 8, 1976). The potential problems grow daily as the FPC encourages the filing of rate increases to provide an incentive to increase the supply of natural gas. . . ." (fn. 54, pp. 856-857.)

Furthermore, Phillips did not permit the suspense royalty money collected to remain idle. O. W. Armstrong, Treasurer of Phillips Petroleum Company, testified in part as follows:

" . . . Phillips' short term investments ranged from 89.7 million dollars in 1964 up to 338.5 million dollars in 1972. . . . Phillips' total assets went up from \$1,806,000,000.00 in 1963, to \$3,269,000,000.00 in 1972, with the exception of 1970 when there was a slight drop. . . . Cash in excess of a given amount would be surplus cash and is invested. . . . the approximately \$6,000,000.00 in F.P.C. suspense money was a part of Phillips' cash, . . . all of Phillips' cash being in one pot, . . . not segregated for any purpose. . . ."

Phillips made substantial profit during the years 1961-1973. The net profit ranged from \$113,000,000 to \$132,000,000 during the period in question and stockholders' equity increased from \$1,205,000,000 in 1962 to over \$1,749,000,000 in 1971.

Phillips' use of the "suspense royalties" was clearly a sound and profitable business practice. We cannot condemn Phillips for

using this money because this was apparently not repugnant to the FPC regulatory scheme, or repugnant to Phillips' contractual relations with the gas purchasers under federal case law. Nor do we condemn Phillips for the FPC delay. However, we do not believe that Phillips may enrich itself in the absence of any contractual sanction or seize upon the procedural complexities of the FPC to avoid responsibility for an appropriate measure of damages, expressed in terms of interest. In *Shapiro v. Kansas Public Employees Retirement System*, 216 Kan. 353, 357, 532 P.2d 1081, the court enunciated the following general principle:

"Interest has been defined as the compensation allowed by law or fixed by the parties for the use, detention, or forbearance of money. In our society today money is a commodity with a legitimate price on the market and loss of its use, whether occasioned by the delay or default of an ordinary corporation, citizen, state or municipality should be compensable."

(See also *Lightcap v. Mobil Oil Corporation*, supra at 468-469.)

In passing we also note a long line of federal cases have concluded Texas law permits—and equity requires—the award of interest on suspense royalties under similar circumstances. (*Phillips Petroleum Company v. Adams*, 513 F.2d 355, 365 [5th Cir. 1975], cert. denied, 423 U.S. 930, 46 L.Ed.2d 259, 96 S.Ct. 281; *First Nat. Bank of Borger v. Phillips Petroleum Co.*, 513 F.2d 371 [5th Cir. 1975], cert. denied, 423 U.S. 930, 46 L.Ed.2d 259, 96 S.Ct. 281; *Phillips Petroleum Co. v. Riverview Gas Compression Company*, 513 F.2d 374 [5th Cir. 1975], cert. denied, 423 U.S. 930, 46 L.Ed.2d 259, 96 S.Ct. 281; *Phillips Petroleum Co. v. Hazlewood*, 534 F.2d 61 [5th Cir. 1976]; *Fuller v. Phillips Petroleum Co.*, 408 F. Supp. 643 [N.D. Tex. 1976]; and *Phillips Petroleum Co. v. Hazlewood*, 409 F. Supp. 1193 [N.D. Tex. 1975].)

In addition, the Texas Civil Court of Appeals recently awarded interest on suspended royalties in *Stahl Petroleum Co. v. Phillips Petroleum Co.*, 550 S.W.2d 360 (Tex. Civ. App. No. 8762, filed April 6, 1977.) This case also arises out of the Hugoton-Anadarko area and the issuance of FPC Opinion No. 586. While recognizing *Phillips Petroleum Company v. Adams*, supra, the Texas Civil Court of Appeals relied on the terms of the *royalty agreement* and the Texas interest statute, rather than unjust enrichment, to require the payment of prejudgment interest on the suspended royalties.

An examination of the royalty agreement set forth in the record herein reveals the lessee (Phillips) contracted to pay and the lessor (royalty owner) contracted to receive a percentage of the "weighted average price per Mcf received by lessee from all sales of gas delivered within" a designated area during any calendar month. While the term "received" is not defined in the contract, giving the term its ordinary meaning, Phillips expressly contracted to pay a percentage of the *price received* for the sale of gas on which month-by-month payments to the royalty owner were to be based. Although the money received by Phillips for the sale of gas in excess of the established rates pending FPC determination was subject to possible refund, *none of the excess was contractually excluded from the price received by Phillips and on which payment to the royalty owner was contractually based.* There was no rule or regulation which prohibited Phillips from including the excess in the amount on which calculation of payment to the royalty owner on a month-to-month basis was made. (*Stahl Petroleum Co. v. Phillips Petroleum Co.*, supra.) But if Phillips chose to withhold payments of contractually owing "suspense royalties" pending FPC approval, as authorized by prior federal case law, that did not relieve Phillips of its contractual obligation to pay the *price received* with interest for the period of time the suspense money was held and used by Phillips.

Oklahoma has no decision allowing interest on "suspense royalties." However, several Oklahoma decisions hold that interest may be awarded on equitable grounds where necessary to arrive at a fair compensation. (*Smith v. Owens*, 397 P.2d 673 [Okla. 1963]; and *First Nat. Bank & T. Co. v. Exchange Nat. Bank and T. Co.*, 517 P.2d 805 [Okla. App. 1973].)

Furthermore, the United States Supreme Court has noted the imposition of interest on refunds ordered by the FPC is not an inappropriate means of preventing unjust enrichment. (*United Gas v. Callery Properties*, 382 U.S. 223, 15 L.Ed.2d 284, 86 S.Ct. 360.)

Based on the foregoing authorities we hold in this case that interest on suspended royalties may be recovered for the period of time such royalties remained in the control of, and were available for use by, the gas producer (Phillips) during the pendency of FPC proceedings and related litigation regarding the determination of applicable lawful rates for gas sales, and litigation regarding the determination of issues involved in this appeal.

Having determined that interest can be awarded, the question becomes what rate of interest should be applied. The district court found:

"The statutory rate of interest herein in Kansas, Oklahoma and Texas is six per cent per annum and is allowed as the proper rate of interest to be applied to the suspended royalties herein from time of receipt until date of judgment herein with interest compounded on an annual basis."

Phillips contends the trial court erred in holding that under the facts in this case it was proper to award compound interest. It argues a (legal) (statutory) rate of six percent (6%) simple interest must apply under the laws of Kansas, Texas and Oklahoma.

The appellee has cross-appealed contending the trial court erred in failing to consider inflation rates and profits so as to place the owners at least on a par with gas purchasers.

In *Lightcap v. Mobil Oil Corporation*, supra, this court resolved the matter. There the court noted:

"Here Mobil and its predecessor made active use of plaintiffs' money, and plaintiffs were deprived of that use. Under the reasoning of the foregoing cases plaintiffs are entitled to be compensated for their loss. Mobil was obligated by FPC order to pay Northern 6% interest on Northern's share of the 'impounded' money; equitable principles require that the royalty owners receive the same treatment as to their share. . . ." (p. 469.) (Emphasis added.)

In the instant case Phillips was obligated by FPC order to pay gas purchasers seven percent (7%) until September 18, 1970, and thereafter eight percent (8%) interest on the gas purchasers' share of the suspense monies. Here equitable principles require, and contractual principles dictate, that the royalty owners receive the same treatment as to their share.

Phillips cites the interest laws of Kansas, Texas and Oklahoma. K.S.A. 16-201 provides:

"Creditors shall be allowed to receive interest at the rate of six percent per annum, when no other rate of interest is agreed upon, for any money after it becomes due; for money lent or money due on settlement of account, from the day of liquidating the same and ascertaining the balance; for money received for the use of another, and retained without the owner's knowledge of the receipt; for money due and withheld by an unreasonable and vexatious delay of payment or settlement of accounts; for all other money due and to become due for the forbearance of payment whereof an express promise to pay interest has been made; and for money due from corporations and individuals to their day or monthly employees, from and after the end of each month, unless the same shall be paid within fifteen days thereafter." (Emphasis added.)

Texas Rev. Civ. Stat., Art. 5069-1.03(1971) states:

"When no specified rate of interest is agreed upon by the parties, interest at the rate of 6% per annum shall be allowed on all written contracts ascertaining the sum payable, from and after the time when the sum is due and payable; and on all open accounts, from the first day of January after the same are made." (Emphasis added.)

Oklahoma Stat., tit. 15, § 266 (1966) states:

"The legal rate of interest shall not exceed six per cent in the absence of any contract as to the rate of interest, and by contract, parties may agree upon any rate not to exceed ten per cent per annum. Said rates of six and ten per cent shall be respectively, the legal rate and the maximum contract rates of interest." (Emphasis added.)

All these statutes refer to situations where there is no agreement as to the rate of interest. Here that situation does not exist.

We are dealing with "suspense royalties" which never could or would belong to Phillips. This was the equivalent of a common fund which was accumulated and used by Phillips. After the FPC Opinion No. 586 was announced the monies accumulated by Phillips in this fund were later divided between the gas purchasers and the gas royalty owners. In other words, Phillips was a stakeholder who retained the fund which it used for its own benefit. (See *Phillips Petroleum Company v. Adams*, supra.) What justified the payment of seven percent (7%), and later eight percent (8%), interest on part of this common fund which Phillips expressly contracted and agreed to pay to the gas purchasers, while paying only six percent (6%) interest to the gas royalty owners, is impossible to discern. If the FPC had denied all of Phillips' rate increase applications, Phillips would have had to pay seven percent (7%), and later eight percent (8%), interest to the gas purchasers pursuant to its express agreement and corporate undertaking with the FPC. Thus, Phillips has made an express agreement, with regard to the monies accumulated in the suspense fund by Phillips, to pay seven percent (7%), and later eight percent (8%) interest, as ultimately determined by the FPC Opinion No. 586.

Due to limitations on the FPC jurisdiction, it could not provide in its order that interest be paid to the gas royalty owners. (*Mobil Oil Corporation v. Federal Power Commission*, 463 F.2d 256 [D.C. Cir. 1972], cert. denied, 406 U.S. 976, 32 L.Ed.2d 676, 92 S.Ct. 2413; and *Lightcap v. Mobil Oil Corporation*, supra at 470,

471.) However, the FPC did require Phillips to agree to pay interest on the suspense monies they held, which agreement the members of the plaintiff class herein assert as an appropriate measure of damages, expressed in terms of interest, for the commingling and use of the suspense monies by Phillips.

This answers Phillips' contention that *Columbian Fuel Corp. v. Panhandle Eastern Pipe Line Co.*, 176 Kan. 433, 271 P.2d 773 and other cases prevent the payment of interest on unliquidated sums. In *Columbian Fuel* an interim rate increase was approved by the Kansas Corporation Commission on natural gas sold to the buyer. The buyer was permitted to withhold the increase upon securing a bond. The seller brought suit seeking to collect interest on the amount withheld. This court noted the temporary nature of the Kansas Corporation Commission order and disallowed interest. The court held:

"In the absence of an agreement therefor interest may not be recovered on a claim as long as the validity of the claim is unadjudicated and the amount on which interest could be computed, if the claim be declared valid, remains wholly uncertain and unliquidated." (Syl. 5.)

Here, of course, an agreement for the payment of interest on the part of Phillips is clearly present. Further, the suspended payments in *Columbian Fuel* did not necessarily belong to another. Here the "suspense royalties" belong either to the royalty owners or the pipeline companies. Thus we reaffirm our decision in *Lightcap*, supra at 466, distinguishing *Columbian Fuel*.

Having determined that seven percent (7%), and later eight percent (8%), interest can be awarded, we must determine whether the actions of the royalty owners have waived their right to interest. The appellant contends the trial court erred in holding that the plaintiff class, by refusing to accept the increased proceeds from gas sales from Phillips under an obligation to refund the same, if Phillips was ultimately obligated to do so, did not waive any claim to interest on such proceeds, or were not estopped from making such claim.

Phillips relies on its July 1961, notice sent to Althea Shutts and all other royalty owners in the Hugoton-Anadarko area which provided in pertinent part:

"Interest owners desiring to receive payments computed currently on the full sums being collected may arrange to do so by furnishing Phillips Petroleum Company acceptable indemnity to cover their proportionate part of any required refunds, plus the required interest."

The seventeen royalty owners who accepted Phillips' offer to reimburse Phillips with interest for any "suspense royalties" which the FPC might require Phillips to refund to the gas purchasers are not members of the plaintiff class. Phillips contends it would be inequitable under these circumstances to require it to now pay interest to these royalty owners who refused to accept the money under the same risk Phillips undertook.

Where, as here, Phillips has expressly contracted to pay a percentage of the *price received* for the sale of gas on which month-by-month payments to royalty owners were to be based, and the amount received by Phillips for the sale of gas in excess of the established rates pending FPC determination, although subject to possible refund, was not contractually excluded from the *price received*, Phillips is in no position to unilaterally impose burdensome conditions upon the royalty owners precedent to fulfilling its contractual commitment albeit permissive until final FPC approval of rate increase applications. Furthermore, the notices sent by Phillips to its gas royalty owners indicated Phillips was not unduly concerned with security for the possible return of "suspense royalties" paid out. The notice sent royalty owners by Phillips on or about November 25, 1970, informed royalty owners it was giving effect to full ceiling rate levels established by FPC Opinion No. 586 in the payment of royalty, although the opinion had not become final. In the notice Phillips further informed royalty owners it would expect reimbursement in full for any overpayments resulting in the reduction of levels relied upon should there be a change in the FPC Opinion No. 586, and that Phillips would withhold from subsequent payments of royalty on gas or oil, or both, at its election, any overpayment occasioned thereby. The royalty owner was told acceptance of the check would constitute consent to such recovery of overpayments.

It is apparent Phillips' previous imposition of burdensome conditions upon royalty owners for payment of royalty at ceiling rate levels pending FPC approval of gas rate increases, was designed to accomplish precisely what the facts disclose. Virtually none of the royalty owners complied with the conditions, thereby leaving the "suspense royalties" in the hands of Phillips as stakeholder to use at its pleasure in the operation of its business over the long period of time the FPC retained jurisdiction over Phillips' rate increase applications.

Under the circumstances we have no hesitation in holding that the royalty owners in the plaintiff class did not waive any claim to interest on "suspense royalties" held by Phillips, by declining to honor the burdensome conditions unilaterally imposed by Phillips for their monthly payment. For the same reasons the royalty owners are not estopped to assert their claim in this action. Phillips' assertion of equity, by arguing it would be inequitable to require Phillips to now pay interest to these persons who refused to accept the money under the same risk that Phillips held it, is not impressive. It distorts the facts and ignores Phillips' admissions. The conditions imposed by Phillips were far more stringent than the corporate undertaking Phillips filed with the FPC.

Phillips argues when the plaintiff class members accepted the December 7, 1972, payment of suspense royalties and negotiated Phillips' checks, this extinguished the debt and any right that might have existed to sue for interest thereon, and that the trial court erred in holding to the contrary. Phillips alleges they do not rely on accord and satisfaction or an estoppel, but rather on the rule that payment of the principal sum is a legal bar to a subsequent action for interest.

The notice Phillips unilaterally mailed to all of its royalty owners on or about December 7, 1972, enclosing checks, to cover payment based upon gas proceeds previously held in suspense, said nothing about interest or how long the money had been held or used by Phillips. However, as previously indicated, Phillips is liable for interest on these suspense royalty funds which it retained as a stakeholder and used in the operation of its business. The payment of these funds to the plaintiff class members, instead of extinguishing the debt, constituted only a partial payment on an interest-bearing debt. This situation invokes application of the so-called "United States Rule," which provides that in applying partial payments to an interest-bearing debt which is due, in the absence of an agreement or statute to the contrary, the payment should be first applied to the interest due. (45 Am. Jur.2d, Interest and Usury, § 99, pp. 88-89; and 47 C.J.S., Interest, § 66, pp. 72-73.)

Kansas approved this rule in *Christie v. Scott*, 77 Kan. 257, 94 Pac. 214, in determining appellate jurisdiction, and cited the rule with approval in *Jones v. Nossaman*, 114 Kan. 886, 221 Pac. 271, 37 A.L.R. 317.

The "United States Rule" is also followed in Oklahoma and Texas. (*Landess v. State*, 335 P.2d 1077 [Okla. 1958]; *Straus v. Brooks*, 126 S.W.2d 542 [Tex. Civ. App. 1939], rev'd on other grounds, 136 Tex. 141, 148 S.W.2d 393 [Civ. App. 1941]; and *J. I. Case Co. v. Laubhan*, 64 S.W.2d 1079 [Tex. Civ. App. 1933].)

Thus, we conclude, acceptance of the so-called "principal sum," by the royalty owners is not a bar to their claim in this case. Phillips raised and lost a similar argument in *Phillips Petroleum v. Riverview Gas Compression Co.*, 409 F. Supp. 486 (N.D. Tex. 1976), the sequel to *Phillips Petroleum Co. v. Adams*, supra.

In the exercise of equitable powers our court has refused to bar relief under theories of ratification, waiver or estoppel where one due to unequal bargaining power or knowledge accepts a check in reliance on a fraudulently induced impression by the payor. (*Prather v. Colorado Oil & Gas Corp.*, 218 Kan. 111, 542 P.2d 297; and cases cited therein.)

Phillips argues the Oklahoma class members are not entitled to recovery by reason of Okla. Stat. Ann., tit. 23, § 8 (1951), which provides: "Accepting payment of the whole principal, as such, waives all claim to interest." In the instant case there is no indication the principal was accepted, as such. We further note Oklahoma has not strictly construed this statute. (*Webster Drilling Co. v. Sterling Oil of Oklahoma, Inc.*, 376 P.2d 236 [Okla. 1962].)

An identical statute in California was said to be a rule of construction to be applied between parties dealing at arm's length, where their agreement is to be inferred from the fact that the principal is tendered and accepted, and the statute was held to have no application where the conditions of payment are such that the creditor has no opportunity to assert his claim for interest at the time of payment. (*McConnell v. Pacific Mutual Life Ins. Co.*, 205 Cal. App.2d 469, 24 Cal. Rptr. 5 [1962].) Here the individual class members had no practical opportunity to assert their claim for interest under the circumstances of Phillips' payout.

We therefore hold on equitable principles Phillips is required to pay its royalty owners herein seven percent (7%) per annum simple interest on suspense royalties from the date of receipt of suspense royalties by Phillips until October 1, 1970 (the effective date of FPC Opinion No. 586), and eight percent (8%) simple

interest per annum thereafter until the payout to the royalty owners on or about December 7, 1972. Applying the "United States Rule" on partial payments, after the payout there was still an unpaid principal sum due equal to the total principal due plus accrued interest, less the payout. Assuming proper calculations, this amount, although principal, would equal the accrued interest on the date of the payout. From December 7, 1972, on until the date of judgment (July 29, 1976) equitable principles and Phillips' contractual undertaking require Phillips to pay its royalty owners herein eight percent (8%) per annum simple interest on the unpaid principal sum (accrued interest on date of payout) plus the unpaid principal sum; and thereafter our post-judgment interest statute, K.S.A. 16-204, requires payment of eight percent (8%) per annum simple interest for the benefit of the royalty owners on the total amount of the judgment until paid.

Accordingly, the judgment of the lower court is affirmed in part and modified in part, and the case is remanded for further proceedings consistent with the foregoing opinion.

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 47,917

IRL SHUTTS, et al., *Appellee and Cross-Appellant*,

v.

PHILLIPS PETROLEUM COMPANY,
Appellant and Cross-Appellee.

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellant and Cross-Appellee for Rehearing is DENIED.

Yours very truly,

LEWIS C. CARTER
Clerk, Supreme Court

Date September 15, 1977

FEB 10 1978

MICHAEL ROSAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-856

PHILLIPS PETROLEUM COMPANY, *Petitioner,*

v.

IRL SHUTTS, as Executor of the Estate of Althea Shutts, Individually, and as representative of all that class of gas royalty owners under Phillips Petroleum Company oil and gas leases in the Hugoton-Anadarko area, *Respondents.*

SUPPLEMENT TO THE PETITION

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-856

PHILLIPS PETROLEUM COMPANY, *Petitioner,*

v.

IRL SHUTTS, as Executor of the Estate of Althea Shutts, Individually, and as representative of all that class of gas royalty owners under Phillips Petroleum Company oil and gas leases in the Hugoton-Anadarko area, *Respondents.*

SUPPLEMENT TO THE PETITION

Pursuant to Rule 24(5) of the Rules of the Supreme Court of the United States, Petitioner Phillips Petroleum Company ("Phillips") submits this supplement to the petition to call attention to an intervening matter not available at the time of the filing of the petition.

On February 1, 1978, the Texas Supreme Court in *Phillips Petroleum Company v. Stahl Petroleum Company*,¹ No. B-6813 (Tex. Sup.) granted Phillips' Ap-

¹ The case being reviewed is reported below in *Stahl Petroleum Company v. Phillips Petroleum Company*, 550 S.W. 2d 360 (Tex. Civ. App.—Amarillo, 1977).

plication for Writ of Error for the purpose of reviewing the question of whether the award of interest on additional royalty payments for the period during which the ascertainment of the amount due was delayed by operation of federal law is contrary to Texas Law. (See Letter from Clerk, Texas Supreme Court, Feb. 1, 1978 at App. 1a-2a) The *Stahl* case, like the instant case, arises out of the Hugoton-Anadarko rate making area and the issuance of Federal Power Commission Opinion No. 586.

The Kansas Supreme Court specifically relied on federal cases applying Texas law and on the *Stahl* case in holding against Phillips in the instant case.* The recent granting of the Application for Writ of Error in the *Stahl* case indicates, however, that the law in Texas, upon which the federal decisions are grounded, is by no means settled as respondents argue

* As the Kansas Supreme Court stated:

In passing we also note a long line of federal cases have concluded Texas law permits—and equity requires—the award of interest on suspense royalties under similar circumstances. (*Phillips Petroleum Company v. Adams*, 513 F.2d 355, 365 [5th Cir. 1975], cert. denied, 423 U.S. 930, 46 L.Ed.2d 259, 96 S.Ct. 281; *First Nat. Bank of Borger v. Phillips Petroleum Co.*, 513 F.2d 371 [5th Cir. 1975], cert. denied, 423 U.S. 930, 46 L.Ed.2d 259, 96 S.Ct. 281; *Phillips Petroleum Co. v. Riverview Gas Compression Company*, 513 F.2d 374 [5th Cir. 1975], cert. denied, 423 U.S. 930, 46 L.Ed.2d 259, 96 S.Ct. 281; *Phillips Petroleum Co. v. Hazlewood*, 534 F.2d 61 [5th Cir. 1976]; *Fuller v. Phillips Petroleum Co.*, 408 F.Supp. 643 [N.D. Tex. 1976]; and *Phillips Petroleum Co. v. Hazlewood*, 409 F. Supp. 1193 [N.D. Tex. 1975].)

In addition, the Texas Civil Court of Appeals recently awarded interest on suspended royalties in *Stahl Petroleum Co. v. Phillips Petroleum Co.*, 550 S.W.2d 360 (Tex. Civ. App. No. 8762, filed April 6, 1977.) This case also arises out of the Hugoton-Anadarko area and the issuance of FPC Opinion No. 586. (Appendix to Petition for Certiorari at 56a)

and as the Kansas Supreme Court believes. Indeed, in two of the cases cited by the Kansas Supreme Court in support of its position, *Phillips Petroleum Company v. Hazlewood*, 534 F.2d 61 (5th Cir. 1976), *pending on motion for rehearing*, No. 76-1290, and *Fuller v. Phillips Petroleum Company*, 408 F. Supp. 643 (N.D. Tex. 1976), *appeal pending*, No. 76-2179 (5th Cir.), the United States Court of Appeals for the Fifth Circuit has stayed further consideration pending resolution of the interest issue by the Texas Supreme Court. (See Letter from Clerk, United States Court of Appeals for Fifth Circuit at App. 3a)

The recent action of the Texas Supreme Court, and the reliance by federal courts and the Kansas Supreme Court on what they may have mistakenly believed to be Texas law, illustrates the need for Supreme Court guidance on the important issue of whether the award of interest for the period when the final payment of additional royalties was delayed by operation of federal law so offends notions of fairness as to be violative of the Due Process Clause.

Respectfully submitted,

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Bartlesville, Oklahoma 74004

APPENDIX

APPENDIX

THE SUPREME COURT OF TEXAS

P. O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS

February 1, 1978

CHIEF JUSTICE

JOE R. GREENHILL

CLERK

GARSON R. JACKSON

JUSTICES

ZOLLIE STEAKLEY

EXEC. ADMINISTRATIVE ASS'T.

WILLIAM L. WILLIS

JACK POPE

ADMINISTRATIVE ASS'T.

SEARS MCGEE

MARY ANN DEPIBAUGH

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2a

Mr. John C. Chambers, Atty
Stone, Stone & Chambers
1701 American National Bank Bldg.
Amarillo, Texas 79101

RE: B-6813: PHILLIPS PETROLEUM COMPANY v. STAHL PETRO-
LEUM COMPANY
Seventh Court of Civil Appeals No. 8762
108th District Court of Potter County No.
55741

Gentlemen:

Today, the Supreme Court of Texas granted the above
referenced application for writ of error on points 1, 5 and
8.

This cause has been set for submission and oral argument
for Wednesday, February 22, 1978 at 9:00 a.m.

Please indicate on the enclosed form which attorney/s will
present oral argument, (see Texas Rules of Civil Proce-
dure No. 498), and return the form to the Clerk's Office
at your earliest convenience.

Also enclosed is a cost bill for the petitioner.

Very truly yours,

GARSON R. JACKSON, Clerk
/s/ by MARY M. WAKEFIELD
Mary M. Wakefield, Deputy

Encl: argument form
cost bill-petitioner

3a

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

June 13, 1977

EDWARD W. WADSWORTH
CLERK

TO ALL COUNSEL OF RECORD

No. 76-1290—Phillips Petroleum Co. vs. Grady
Hazlewood; Alstar Production Corp.

No. 76-2144—Phillips Petroleum Co. vs. Riverview
Gas Compression Co., Etc., Et Al.

No. 76-2179—R. P. Fuller, Et Al vs. Phillips
Petroleum Company.

No. 76-2535—Van Norman Oil Co. vs. Phillips
Petroleum Co. vs. American Petrofina
Company of Texas.

Dear Counsel:

The Court has asked me to advise you that it will withhold
action in the above matters until the adjournment of the
Supreme Court of Texas this summer, in hopes that ac-
tion on the applications for writ of error will by that time
have been accomplished.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

/s/ By GILBERT F. GANUCHEAU
Gilbert F. Ganucheau
Chief Deputy Clerk

JAN 13 1978

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-856

PHILLIPS PETROLEUM COMPANY,

Petitioner,

vs.

IRL SHUTTS, As Executor of the Estate of Althea Shutts,
Individually, and as representative of all that class of gas
royalty owners under Phillips Petroleum Company oil
and gas leases in the Hugoton-Anadarko area,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

*W. LUKE CHAPIN

CHAPIN AND PENNY

P. O. Box 148

Medicine Lodge, Kansas 67104

Attorneys for Respondents

January, 1978

*Counsel upon whom service is to be made.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-856

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

IRL SHUTTS, As Executor of the Estate of Althea Shutts,
Individually, and as representative of all that class of gas
royalty owners under Phillips Petroleum Company oil
and gas leases in the Hugoton-Anadarko area,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the Supreme Court of the State of Kansas and of the trial court are as recorded in the Petition. In addition, the trial court's class order and notice is attached hereto as an Appendix.

JURISDICTION

The jurisdictional requirements are as set forth in the Petition for Certiorari.

QUESTION PRESENTED

The federal question, if any, is: Whether it is a violation of Phillips' due process or equal protection rights for nonresident members of plaintiff class to be included in the benefits of a Kansas state court judgment against Phillips.

STATUTE INVOLVED

K.S.A. §60-223, the Kansas class action statute, as set forth in the Appendix to the Petition, 1a to 3a. K.S.A. 60-266 is not involved here. It simply says: "This article (on civil procedure in Kansas) shall not be construed to extend or limit the jurisdiction of the District Courts or the venue of actions therein." Phillips apparently reads this statute as though it says only that the article shall not extend jurisdiction. Not so. "Article II was drafted with the intention of avoiding any conflict with the statutes dealing with jurisdiction and venue, and (K.S.A. 60-266) makes explicit the disclaimer of any attempt to do so." (Vernon's Kansas Statutes Annotated, Comments on §60-266.) §60-266 has nothing to do with this case.¹

1. Vernon's Comments further reads: "This rule is substantially the same as Federal Rule 82. . . . Thus Rule [60-266] provides in simple terms that jurisdiction and venue of the District Courts, which are regulated by other statutory provisions, are unaffected by Article II and the rules therein. It has thus been said:

" . . . Rule 82 dispels any doubt that the [federal] rules of civil procedure must be viewed through a jurisdictional latticework externally constructed." *Healy v. Pennsylvania R. R.*, CA.3d 1950, 181 F.2d 934, 935'."

STATEMENT OF THE CASE

This is one of four cases in which major oil and gas producing companies are seeking review of opinions of the Supreme Court of Kansas finding the companies liable for interest on gas royalties *suspended and used* by the companies pending Federal Power Commission opinion and approval of the opinion. The other cases are:

Gulf Oil Corporation v. Maddox, et al., No. 77-798;

The Superior Oil Company v. William J. Sterling, et al., No. 77-847;

Northern Natural Producing Company and Mobil Oil Corporation v. Hazel Nix, et al., No. 77-848.

Until June 1, 1961, Phillips had paid over to its gas royalty owners in the Hugoton-Anadarko area all of their share (approximately 1/8th royalty share) of the increased rates being collected by Phillips for gas sales, as well as their royalty share of so-called firm proceeds from the sale of gas. However, "Beginning June 1, 1961, Phillips management decided to begin withholding all of its royalty owners' share of increased gas prices subject to refund, unless the royalty owners put up an acceptable indemnity to repay the same with interest if the increased prices were not approved by the FPC." (*Shutts, et al. v. Phillips Petroleum Company*, Appendix 29a.)

The Hugoton-Anadarko area is a gas production area as defined for rate making by the Federal Power Commission and it consists of all of the State of Kansas, and certain parts of the States of Oklahoma and Texas.²

2. The Hugoton-Anadarko area is defined more specifically in 18 C.F.R. §154.106(g). The geographical boundaries of gas producing areas do not recognize state lines. For instance, the Hugoton field, named after Hugoton, Kansas, extends into both Oklahoma and Texas.

Plaintiff Shutts filed this action individually and as representative of that class of gas royalty owners under defendant Phillips oil and gas leases in the Hugoton-Anadarko area. Shutts is a resident of Kansas, and he owns royalties under Phillips' leases in Texas and Oklahoma. (*Shutts*, 27a.)

The increase in gas rates collected by Phillips went into Phillips' corporate treasury and was commingled with its other corporate funds and used by Phillips, without ever giving notice of this fact to its royalty owners. (*Shutts*, 30a.)

FPC Opinion No. 586 was entered on September 18, 1970, approving most of the rate increases filed. The validity of FPC Opinion No. 586 was challenged in the courts and finally sustained on October 28, 1972. (*Shutts*, 30a, 31a and 32a.) Subsequently, in about December, 1972, approximately 6,400 persons and firms constituting Phillips royalty owners in the Hugoton-Anadarko area were paid about \$5,700,000.00 in additional royalties due them by virtue of the finality of FPC Opinion No. 586. (*Shutts*, 32a.)

Notice was sent with such FPC suspense royalty checks which discloses "Phillips neither paid nor offered to pay any interest for the use of the money, nor did Phillips say anything about interest or how long the money had been held or used by Phillips." (*Shutts*, 32a.)

As to portions of the suspended rates not approved, Phillips was under contractual duty to refund the same to its gas purchasers, "with interest at the rate of seven percent (7%) per annum from the date of receipt until September 18, 1970, and eight percent (8%) per annum thereafter until paid out. . ." (18 C.F.R. §154.102 (c) and FPC Opinion No. 586, page 33; as quoted at *Shutts*, 28a.)

FPC has no jurisdiction over amounts paid to gas royalty owners³ and had no regulations covering interest due gas royalty owners on FPC suspense royalty payments.

On May 1, 1975, the trial court granted plaintiffs' Motion for a Class Order, and all members of the class were served with notice by first class mail and by publication.⁴

Ordinarily, if a question of jurisdiction would be raised as to nonresident members of plaintiff class, it would be raised by a nonresident member in the court of another state, after judgment against the plaintiff class. However, in this case, Phillips attempts to raise the question of jurisdiction of the Kansas courts over nonresident members after judgment in favor of plaintiff class, in order to save itself from paying a substantial part of the judgment against it.

Statutes of limitation have run against the payment of interest on the FPC suspense royalties in Oklahoma and Texas.⁵ Royalty owners in the Hugoton-Anadarko area are not entitled to go into the federal court and bring a class action because many of the claims are less than \$10,000.00.⁶ This leaves the Kansas court as the only forum and the Kansas Court's judgment in this case as the only possibility of nonresidents of Kansas obtaining interest on the FPC royalty funds here involved.

Phillips does business in Kansas and has been duly served with process in Kansas. No question is asserted

3. *Mobil Oil Corp. v. Federal Power Commission*, 463 F.2d 256 (D. C. Cir.), cert. denied, 406 U.S. 1976 (1972).

4. See Appendix attached to this Brief for full copy of Class Order and of Notice.

5. See *Shutts*, 40a.

6. See *Shutts*, 39a and cases there cited.

as to the jurisdiction of the trial court or the Supreme Court over Phillips or the trial court's power to enforce a judgment against Phillips.

REASONS FOR NOT GRANTING THE WRIT

I. The Kansas Court's Decision Granting Interest Was in Line With All Applicable Law.

Phillips has not raised any federal question pertaining to the allowance of interest. Be that as it may, the Kansas Court's decision allowing interest in this case is fully supported by a U. S. Supreme Court case⁷ and by all other applicable law. The trial court allowed interest on the basis that Phillips would be unjustly enriched if it were allowed to use royalty owners' money without paying interest on the money so retained and used.

The Supreme Court of Kansas affirmed on the unjust enrichment theory and further found and held that:

"What is significant is these gas royalty suspense monies never did or could belong to Phillips." (*Shutts*, Appendix 55a.)

"Phillips made substantial profit during the years 1961-1973. The net profit ranged from \$113,000,000.00 to \$132,000,000.00 during the period in question and stockholders' equity increased from \$1,205,000,000.00 in 1962 to over \$1,749,000,000.00 in 1971." (*Shutts*, Appendix 55a.)

". . . We do not believe that Phillips may enrich itself in the absence of any contractual sanction or

7. *United Gas Improvement Co. v. Callery Properties Inc.*, 382 U.S. 223, 15 L. Ed. 2d 284, 86 S. Ct. 360.

seize upon the procedural complexities of the FPC to avoid responsibility for an appropriate measure of damages, expressed in terms of interest." (*Shutts*, Appendix 56a.)

". . . If Phillips chose to withhold the payments of contractually owing 'suspense royalties' pending FPC approval, as authorized by prior federal case law, that did not relieve Phillips of its contractual obligation to pay the price received with interest for the period of time the suspense money was held and used by Phillips." (*Shutts*, Appendix 57a.)

"Furthermore, the United States Supreme Court has noted the imposition of interest on refunds ordered by the FPC is not an inappropriate means of preventing unjust enrichment. (*United Gas v. Callery Properties*, 382 U.S. 223, 15 L. Ed. 2d 284, 86 S. Ct. 360.)" (*Shutts*, Appendix 57a.)

"We are dealing with 'suspense royalties' which never could or would belong to Phillips. This was the equivalent of a common fund which was accumulated and used by Phillips. . . Phillips was a stakeholder who retained the fund which it used for its own benefit . . . if the FPC had denied all of Phillips' rate increase applications, Phillips would have had to pay 7% and later 8%, interest to the gas purchasers pursuant to its express agreement and corporate undertaking with the FPC. Thus, Phillips has made an express agreement, with regard to the monies accumulated in the suspense fund by Phillips, to pay 7% and later 8% interest, as ultimately determined by the FPC Opinion No. 586." (*Shutts*, Appendix 59a.)

"Here, of course, an agreement for the payment of interest on the part of Phillips is clearly present." (*Shutts*, Appendix 60a.)

"In passing we also note a long line of federal cases have concluded Texas law permits—and equity required—the award of interest on suspense royalties under similar circumstances. (*Phillips Petroleum Company v. Adams*, 513 F.2d 355, 365 [5th Cir. 1975], cert. denied, 423 U.S. 930, 46 L. Ed. 2d 259, 96 S. Ct. 281; *First Nat. Bank of Borger v. Phillips Petroleum Co.*, 513 F.2d 371 [5th Cir. 1975], cert. denied, 423 U.S. 930, 46 L. Ed. 2d 259, 96 S. Ct. 281; *Phillips Petroleum Co. v. Riverview Gas Compression Company*, 513 F.2d 374 [5th Cir. 1975], cert. denied, 423 U.S. 930, 46 L. Ed. 2d 259, 96 S. Ct. 281; *Phillips Petroleum Co. v. Hazlewood*, 534 F.2d 61 [5th Cir. 1976]; *Fuller v. Phillips Petroleum Co.*, 408 F. Supp. 643 [N.D. Tex. 1976]; and *Phillips Petroleum Co. v. Hazlewood*, 409 F. Supp. 1193 [N.D. Tex. 1975].)" (Shutts, Appendix 56a.)

It follows that the award of interest by the Kansas Supreme Court is in accord with the decisions of this Court and all other courts that have considered the allowance of interest on FPC suspense royalties. The award of interest involves no federal question and was eminently fair and just.

II. Phillips' Royalty Owners in the Hugoton-Anadarko Area Constitute a Fixed and Definite Class, Having Contacts With Kansas.

Phillips asserts the class includes nonresidents having "absolutely no contract with the State of Kansas." (Petition, 3.) Not so. Whether or not "minimum contacts" are necessary for plaintiff class jurisdiction, the many contacts that tie this certain group of Phillips royalty owners together are enumerated in the Shutts opinion, 52a, 53a, as follows:

"The names, addresses and suspense royalty amounts for each of the royalty owners were readily available in Phillips' records. In fact, the class is more manageable with nonresidents of Kansas included because Phillips would be required to take an extra step in separating nonresident royalty owners in its records. Phillips treated all royalty owners in the Hugoton-Anadarko area alike, regardless of residency, particular lease provisions or royalty agreements. (See Phillips' notices to royalty owners heretofore quoted as stipulated by the parties herein.) Actually, it would be difficult to imagine a more manageable plaintiff class action.

"Kansas has a legitimate interest in adjudicating the common issue herein because Kansas comprises the largest physical area included in the FPC designated Hugoton-Anadarko area where Phillips is doing business and producing gas which it sells in interstate commerce. All of the gas royalty owners in the Hugoton-Anadarko area have leases with Phillips and a common interest in the money collected by Phillips as 'suspense royalties' from the sale of gas in the designated area. It was the same FPC regulation that caused and permitted Phillips to collect the 'suspense royalties' and the same FPC Opinion No. 586 pursuant to which the 'suspense royalties' were paid out to the royalty owners in the area. All of the gas royalty owners in the Hugoton-Anadarko area have a right in common with each other, in the equivalent of a common fund, to claim damages for commingling and use of the 'suspense royalties' by Phillips, payable as interest, and they have a contact with Kansas by reasons of such common interest."

III. "Fair Play and Substantial Justice" Require That Nonresident Class Members Be Allowed to Keep Their Judgment.

Phillips opens its brief with a rather rash statement:

"For the first time in the United States, a state court has attempted to exercise in personam jurisdiction over a nationwide plaintiff class in which 96% of the class members were nonresidents of and had no contact whatsoever with the forum state." (Petition, 6.)

First, this is not a nationwide plaintiff class. It is restricted to (1) gas royalty owners under Phillips oil and gas leases, (2) those certain gas royalty owners whose leases to Phillips are within the State of Kansas or parts of Oklahoma and Texas (the Hugoton-Anadarko area) and (3) only those Hugoton-Anadarko Phillips lessors who elected to stay in the class action, after first class mail notice, by failing to write a letter of exclusion to the Clerk of the Court within a certain time.

Second, this is not the first time that a state court has exercised such jurisdiction over a multi-state plaintiff class. Other instances are spelled out in the *Shutts* opinion, 42a.⁸

Third, a substantial number "... 218 of the (class members) were residents of Kansas ... the record is barren as to the number in the plaintiff class residing in other states who have gas leases with Phillips covering

8. *Chance v. Superior Court*, 58 Cal. 2d 275, 23 Cal. Rptr. 761, 373 P.2d 849; *Darr v. Yellow Cab Co.*, 67 Cal. 2d 695, 63 Cal. Rptr. 724, 433 P.2d 732; *Horst v. Guy*, 211 N.W.2d 723 (N. Dak. 1973); also, see *Payle v. Coca-Cola Company*, 389 Mich. 583, 209 N.W.2d 232 (1973); and *Holstein v. Montgomery Ward & Co., Inc.*, CCH Pov. L. Rptr. §9, 652 (1968-71 transfer binder) at 10, 784 (Ill. Cir. Ct. 1969).

land in Kansas, which encompasses the largest portion of the Hugoton-Anadarko area." (*Shutts*, 32a.) And *Shutts*, the named plaintiff, also represented Oklahoma and Texas royalty owners because his royalties were located in those states. (*Shutts*, 27a.)

Fourth, whether or not any "minimum contacts are necessary, this group of Phillips' Hugoton-Anadarko area royalty owners is tied together and with the State of Kansas by many contacts set forth in the preceding section II of this brief.

Phillips goes on to argue that *International Shoe Co. v. Washington*, 326 U.S. 310, setting forth rules applying to nonresident defendants, also applies to nonresident members of plaintiff class. Phillips says that the requirement is that there be "certain minimum contacts with (the state) such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (Petition, 6.) Traditional notions of fair play and substantial justice will be offended only if the interest judgment to which they are rightly entitled is taken away from class members by the Phillips subterfuge that it would be a denial of the due process of law to Phillips to require it to pay interest to nonresident members of plaintiff class. Phillips does not quarrel with the fact that the Kansas court has in personam jurisdiction over Phillips and the right and authority to require it to pay interest.

The meaning of the words "due process" and "fair play and substantial justice" evidently escapes Phillips. Due process has been afforded to members of plaintiff class. They have elected to stay in the action and not "opt out" after first class mail notice. Fair play and justice can only be afforded nonresident members of the plaintiff class by allowing them the benefit of their judgment against Phillips—not by taking it away from them.

IV. The Kansas Court's Decision Is Consistent With the Decisions of This Court and With Established Law.

Phillips concedes that: "A nonresident plaintiff may bring an action against a defendant in any state which can properly assert jurisdiction over the defendant." (Petition, 10.) But Phillips argues that the nonresident plaintiffs in this case have not taken any affirmative action to submit themselves to the jurisdiction of the Kansas court.

This argument is contrary to the whole theory of Federal Procedural Rule No. 23 as amended in 1966 and to the Kansas statute, K.S.A. 60-223 which was amended and patterned after Federal Rule No. 23 in 1969. (See K.S.A. 60-223, the class action statute, at Appendix to the Petition, 1a to 3a.) Provisions in both the Federal Rule and the Kansas statute are practically the same pertaining to members electing to exclude themselves after proper notice. Phillips apparently is arguing that the "opt out" procedure as compared to the former "opt in" procedure is not proper.

The Kansas court in *Shutts*, Appendix 39a, referred to the new Federal Rules of Civil Procedure as amended in 1966 and pointed out that such rules allow a judgment to bind all class members unless a member affirmatively "opted out" of the litigation at its commencement. The same is true of the Kansas rules.

The propriety of binding absent class members outside the jurisdiction of the forum court was decided long ago. This is because there is a difference in the jurisdictional standards governing class actions and other actions. In *Hansberry v. Lee*, 311 U.S. 32, this court found:

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party. . .

"To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, . . . may bind members of the class or those represented who were not made parties to it . . .

"Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all *because some are not within the jurisdiction* or because their whereabouts is unknown . . ." 311 U.S. at 40-2. (Emphasis supplied.)

To bind absent class members, the due process protections of notice and representation must be afforded.⁹

This was provided here and Phillips challenges neither the method of notice nor the form or quality of representation.

9. See page 140 of *Appleton Electric Co. v. Advance-United Expressways*, 494 F.2d 126, where it is said: "The notice and exclusion provision of Rule 23 (c) (2) were designed to 'fulfill requirements of due process to which the class action procedure is of course subject.' 28 U.S.C., Rule 23, Advisory Committee's Note at 302. The clearest statement of those requirements is in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). To be bound by a final judgment in a representation suit, one must be 'informed that the matter is pending and [have the opportunity] to choose for himself whether to appear or default, acquiesce or contest.' 339 U.S. at 314, 70 S. Ct. at 657. The kind of notice mandated in *Mullane* is exactly the kind of notice defendant class members will receive in this case . . . The members' contacts with the forum are as irrelevant here as were beneficiaries' contacts with the State of New York in *Mullane*."

In *Advertising Specialty National Ass'n v. Federal Trade Commission*, 238 F.2d 108, 120 (1st Cir. 1956), the court found foreign members bound by a judgment in a proper class suit even though outside the jurisdiction.

Many commentators have considered the question raised by Phillips. They support the Kansas court's decision on the issue. Professor Chafee in *Some Problems of Equity*, 258 (1950) notes the Restatement of Judgments "gives the court where a class action has been properly brought jurisdiction to bind unnamed members, even if not personally within the jurisdiction of the court." Likewise, Professor Moore in his treatise, 3B Moore's Federal Practice, ¶23.11 (5), in discussing the 1928 Federal Rules of Civil Procedure 23 indicates:

"The fact that members of the class are beyond the territorial limits of the class suit court is immaterial as to the binding effect of the class suit judgment."

The Restatements are also in agreement. The Restatement of Judgments states:

Section 26: Representative or Class Actions.

"Where a class action is properly brought by or against members of a class the court has jurisdiction by its judgment to make a determination of issues involved in the action which will be binding as res judicata upon other members of the class, although such members are not personally subject to the jurisdiction of the court."

Tentative draft number 2 of the Restatement (Second) of Judgments §85 (April 15, 1975) provides:

"(2) A person represented by a party to an action is bound by the judgment even though the person

himself does not have notice of the action, is not served with process, or is not subject to the service of process."

See also, Note, "Consumer Class Action of a Multi-State Class: A Problem of Jurisdiction," 25 *Hast. L. J.* 1411, 1432, 1435 (1974);¹⁰ and 30A C.J.S. *Equity* §1456 (4) at 124.

This Court has implicitly concluded class actions with a multi-state class can and should be brought in state courts. In *Snyder v. Harris*, 394 U.S. 332, the Court noted class actions premised on diversity of citizenship can "most appropriately be tried in state court" (*Id.* at 341) and plaintiffs "had nothing to fear from trying the lawsuit in the courts of their own state." (*Id.* at 340.) (See, also *Zahn v. International Paper Co.*, 414 U.S. 291.) This led the court in *Shutts* to question, at 40a, "[i]f the state courts will not hear the matter, who will grant relief?" See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366.

10. 25 *Hastings Law Journal*, 1411, pages 1432 and 1435: "A class action must proceed in the absence of almost every class member. Therefore, ultimately, the residential makeup of a class is unimportant. What is important is that the rights of absent members be justly protected and that members be given an opportunity to be heard if they so desire. These are the essential elements of due process, and they must be satisfied in any class action by every court, state or federal, regardless of the residences of the absent class members. Therefore, whereas the essential jurisdiction over a nonresident defendant is some tangible connection between him and the forum state, the element necessary to the exercise of jurisdiction over plaintiff classes is procedural due process. (Emphasis supplied.) (Page 1432.) . . .

"It is . . . the suggestion of this note that by adhering to the same jurisdictional standards of due process required on the federal level, state courts can exercise jurisdiction over a class action regardless of the citizenship of the class members." (Page 1435.)

Judge Morris E. Frankel noted:

"If all the pertinent criteria are fairly satisfied, I believe we'll discover that the preliminary shock of 'binding' absent people will subside or disappear and that the intended functioning of the [class action] rule . . . actually promotes essential fairness and justice no less than the secondary goal of judicial efficiency." (43 F.R.D. 45, 46.)

Separate suits in each of the states where class members reside would be an extraordinarily inefficient, expensive and burdensome method of proving the liability. Phillips is merely attempting to eliminate or diminish its liability through a subterfuge.

V. State Court Decisions Are Based on the Facts and Can Be Reconciled.

Phillips argues that state court opinions are in conflict on the question of jurisdiction over plaintiff classes because there is one Pennsylvania case and one New Jersey case opposed to the *Shutts* opinion. There is no contradiction in the holding of various state courts as to the law. Both the Pennsylvania and New Jersey cases were discussed in *Shutts* (44a to 46a) and held inapplicable for reasons there stated.¹¹

11. (a) *Re: Klemow* (Pa.): "It is apparent the Pennsylvania statutory language is completely at variance with the Kansas statutory language." See *Shutts* at 45a, and the sharp difference in the Pennsylvania statute as compared to Kansas where it is said in the Pennsylvania statute as to a class action:

" . . . the judgment in such action shall not impose personal liability on anyone not a party hereto."

(b) *Re: Feldman v. Bates* (N.J.): "An excellent example of a factual situation in which a trial judge applying our class action statute should deny certification of a class action, where nonresident plaintiff class members are involved, is presented in *Feldman v. Bates Mfg. Co.*, *supra*." (*Shutts*, 52a.)

(c) For state cases involving multi-state classes, see note (8) this brief, *supra*.

VI. Phillips Used the Royalty Owners' Money.

Phillips contends that its royalty owners had no gas to sell and no interest in the proceeds of sale. (Petition, 16.) The Kansas court answered this mistaken contention very well as follows:

"What is significant is these gas royalty suspense monies never did or could belong to Phillips." (Appendix to Petition, 55a.)

"It is important to note that during this period of time (June 1, 1961, to October 1, 1970) Phillips had no entitlement to the gas royalty owners' share of the 'suspense royalties' whether or not the rates were approved by FPC. Phillips never owned the money. . . That royalty share, according to eventual FPC ruling, was either to go to Phillips' royalty owners or back to Phillips' gas purchasers with interest, or part to one and part to the other." (*Shutts*, 30a.)

It was Phillips that had no interest in the royalty share—the FPC suspense royalties—not the royalty owners as argued by Phillips.

VII. Common Fund Cases Are Analogous to This Case.

On the question of including nonresident class plaintiffs, the Kansas court considered the so-called "common fund" cases and held them to be analogous to this case.¹²

12. *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662, 59 L. Ed. 1165, 35 S. Ct. 692; *Royal Arcanum v. Green*, 237 U.S. 531; *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356; *Sovereign Camp v. Bolin*, 305 U.S. 66; *Carpenter v. Pacific Mutual Life Ins. Co.*, 10 Cal. 2d 307, 74 P.2d 761, affirmed sub nom. *Neblett v. Carpenter*, 305 U.S. 297, rehearing denied, 305 U.S. 675; and see *Shutts*, 46a to 48a.

The Kansas court, in *Shutts* 47a, said:

"The 'common fund' cases, which seem to be universally accepted, are closely analogous to the case at bar. Here Phillips filed a corporate undertaking guaranteeing to refund any or all portions of 'FPC suspense money' with interest which it collected and held pending FPC determination of the lawful gas rates in the Hugoton-Anadarko area rate proceedings. . .

"Had Phillips put the 'suspense royalties' into a common trust fund, separate from its operating funds, to be used solely to pay either the pipeline companies or the gas royalty owners once the FPC ultimately decided the rate increase question, this case would dovetail nicely into the 'common fund' cases. Instead Phillips commingled the 'suspense royalties' to fulfill its business obligations. In this matter the 'suspense royalties' which never did or could belong to Phillips, enriched Phillips at the expense of the royalty owners. To hold that Phillips' act of using the money for business purposes and not putting it into a separate corporate account, takes this case out of the 'common fund' category would reward Phillips' action at the expense of innocent gas royalty owners." (Citing *Perlman v. First National Bank of Chicago*, 15 Ill. App. 3d 784, 305 N.E.2d 236 which held:

". . . there seems no basis in law or logic for permitting a class action against an individual who has sequestered all money wrongfully acquired but denying one against an individual who has commingled it with his other assets.")

Phillips concedes that the "common fund" cases are correct holdings (Petition, 16), but attempts to distinguish the facts. Actually, the facts cannot be successfully distin-

guished and the Kansas court has correctly ordered a common interest fund to be paid over to the Phillips' royalty owners.

VIII. Answers to Phillips' Other Claims.

Phillips claims that "in fact each royalty owner's claim can be adjudicated separately without affecting the rights of any others." This theory of "divide and conquer" has been Phillips' theory of trying the lawsuit. In order to decrease liability, Phillips would like to limit the lawsuit either to the named plaintiff only, or to his co-lessors and royalty owners. Failing that, Phillips would like to limit it to the so-called "designated area" of one county in Oklahoma and two counties in Texas where Shutts has his royalties. Failing that, they would like to limit it to residents of Kansas only. The Kansas trial court and Supreme Court correctly limited the class to Phillips' gas royalty owners in the Hugoton-Anadarko area.

Phillips, by seeming to argue the case as though the judgment were unfavorable to plaintiff class, attempts to present a hypothetical case that does not exist. Phillips is not arguing for nonresident class members but for itself. The Kansas court judgment granted to members of the class everything they filed suit to secure. It is far too tenuous to assume first, a dissatisfied class member exists; second, if he does exist, he will try to relitigate his claim, having secured by Kansas judgment all he could possibly obtain; and third, if he tries to relitigate the claim the forum court will find he was not bound by the Kansas court judgment.

This brief represents both residents and nonresidents in opposition to the Petition for Certiorari. The nonresident members do not want to relitigate. They do not

want Phillips arguing "for" them. They want to be left in the case and have the benefits of their judgment.

Phillips further argues that there is a provision in K.S.A. 60-223 not included in Federal Rule of Civil Procedure 23 that gives the District Court authority to deny exclusion (Petition, 19, Note 12) thereby making the notice provisions ineffectual. This is a moot question. No member of plaintiff class in this case made timely request to be excluded who was not excluded. (Trial Court's Conclusion of Law No. 10, 9a.)

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

W. LUKE CHAPIN

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January, 1978

APPENDIX

CLASS ORDER AND ORDER FOR NOTICE

(Filed May 2, 1975)

ON the 5th day of March, 1975, this matter comes regularly on for hearing on defendant's Motion to Dismiss as to all members of plaintiff class not residents of Kansas and plaintiff's Motion to Certify as a Class Action. Plaintiff appears by his attorneys, W. Luke Chapin, of Chapin & Penny, Medicine Lodge, Kansas; and the defendant appears by its attorneys, Joseph Kennedy, of Morris, Laing, Evans, Brock & Kennedy, Wichita, Kansas, and T. L. Cubbage II of Amarillo, Texas.

THEREUPON, the motions are presented and argued to the Court. Thereafter, the matter having been briefed by counsel and memorandum opinion and requested findings of fact and conclusions of law having been submitted by counsel for the parties, and the Court having read the briefs and requested opinions, findings and conclusions and having examined the pleadings and files herein, and having heard the arguments of counsel, and being well and fully advised in the premises, files his memorandum opinion herein dated March 31, 1975, which is made a part hereof by reference and further finds that this action should be maintained as a class action; and the Court further specifically finds as follows:

1. The proposed class of parties plaintiff is extremely numerous and exceeds some 6,600 members and an actual joinder of all of such members is totally impracticable.
2. The Hugoton-Anadarko area consists of all of the State of Kansas and certain counties of Texas and Oklahoma.

3. The plaintiff's claim is typical of the claims of all the members of the proposed class except that each owner may be entitled to a different amount of interest or damages; and the damages to each of the owners, if allowed, would be too small to enable each owner to file a separate action.

4. The prosecution of separate actions by individual members of the proposed class would create a risk of adjudications with respect to such individual members of the class which would, as a practical matter, be dispositive of the interests of the other members not parties to such adjudications and might substantially impair or impede their ability to protect their interests.

5. The proposed class of plaintiffs are royalty owners and own their interests in the Hugoton-Anadarko area under oil and gas leases with defendant Phillips Petroleum Company.

6. The only questions of law and fact are common to the entire proposed class of plaintiff-royalty owners in that the sole issue appears to be whether defendant Phillips is liable for interest or damages on the money received by it from purchasers of gas and withheld by defendant Phillips pending approval of the Federal Power Commission for a period from June 1, 1961, through December 7, 1972.

7. The plaintiff alleges a claim which has substantial possibility of success providing the Court is persuaded of its merits.

8. The plaintiff is represented by counsel who can adequately represent the entire class and the plaintiff will himself adequately represent the entire class.

9. The questions of fact and law common to the members of the proposed class dominate over any questions affecting separate individual members and a class action appears to be superior to any other available means for a fair and efficient adjudication of the controversy.

10. This action should be certified as a class action under K.S.A. 60-223 as to all of defendant Phillips' gas royalty owners in the Hugoton-Anadarko area. The Court specifically defines that the plaintiff class in this case is as follows:

"All persons who were in or before 1973, entitled to gas royalties (excluding overriding royalties not owned by gas royalty owners) under oil and gas leases owned by Phillips Petroleum Company, on lands in the Hugoton-Anadarko area and who received on December 7, 1972, and in 1973, payment of royalties attributable to price increases collected by Phillips subject to possible future refund in the event of disapproval by the Federal Power Commission, Phillips having paid such royalties or the increased prices on December 7, 1972, and in 1973 to the extent finally approved by the F.P.C. in its Opinion No. 586."

11. Notice should be given to all members of the class entitled to gas royalties during the period June 1961 through October 1, 1970 (the time involved when gas price increases were withheld by Phillips pending final approval of the Federal Power Commission).

12. Notice of the pendency of the action, its nature and effects of any judgment shall be given to all members of the class as follows:

a. Each member of the class as herein defined whose name and address is contained in defendant's

records shall be notified of the pendency and ultimate legal effect of the action and of the right to request exclusion by sending each class member a notice in form to be approved by the Court.

b. Such notices shall be sent to all such persons as are currently receiving royalty payments by the defendant. The defendant shall send and include such notice in the next royalty payment disbursed to such persons; and such notices shall be sent no later than the June 1975 royalty payment. Such notices may be sent by defendant in separate envelopes from the royalty payments if preferred by defendant. The defendant shall defray the costs thereof; however, any additional costs required to comply with this judgment shall be considered to be and shall be taxed as costs herein.

c. The plaintiff shall prepare a sufficient number of notices to be included in all of the mailings of the defendant as set forth in paragraph a. above and such notices shall be included in the royalty payments as aforesaid (or in separate envelopes if preferred by defendant). Any costs of additional labor or postage shall be defrayed by the defendant and shall be certified to the Clerk of the Court, the same to be taxed as costs herein.

d. In the event that there are members of the class who are not receiving royalty payments from the defendant at the present time, the defendant shall furnish to the plaintiff the names and addresses of said persons and the plaintiff shall cause to be sent a copy of such notice to such persons by U. S. mail, the costs thereof to be defrayed by the plaintiff and the same to be taxed as costs herein.

e. The plaintiff shall cause a notice by publication to be given pursuant to K.S.A. 60-307, such publication to be once each week for three consecutive weeks in a newspaper of general circulation in each of the following cities: Amarillo, Texas; Liberal, Kansas; Elkhart, Kansas, Guymon, Oklahoma; Oklahoma City, Oklahoma; Wichita, Kansas; and Hutchinson, Kansas. The plaintiff shall advance the costs thereof and such costs shall be certified to the Clerk herein as costs. The notices as aforesaid shall in no case commence later than June 15, 1975.

14. Defendant's Motion to Dismiss is hereby overruled.

15. The Court further finds that this order certifying the class involves a controlling question of law; namely, the jurisdiction of this Court as to all members of the class, and to which there is substantial ground for difference of opinion; and that an appeal from the order certifying the class will materially advance the ultimate termination of the litigation, and the implementation of this order is stayed pending such interlocutory appeal, provided that the same is promptly taken by the defendant as provided by law.

IT IS BY THE COURT SO ORDERED.

ENTERED by the Court on the 1st day of May, 1975.

IN THE
DISTRICT COURT OF KIOWA COUNTY, KANSAS

No. 5309

IRL SHUTTS, as Executor of the Estate of
Althea Shutts, Individually and as Representative of certain others,
Plaintiffs,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant.

NOTICE OF CLASS ACTION SUIT

TO: All persons who were in or before 1973, entitled to gas royalties (excluding overriding royalties not owned by gas royalty owners) under oil and gas leases either owned by Phillips Petroleum Company or under which Phillips accounted for and made royalty payments, on lands in the Hugoton-Anadarko area and who received on December 7, 1972, and in 1973, payment of royalties attributable to price increases collected by Phillips subject to possible refund in the event of disapproval by the Federal Power Commission, Phillips having paid such royalties on the increased prices on December 7, 1972, and in 1973, to the extent finally approved by the F.P.C. in its opinion No. 586.

This suit was filed in September, 1974, by Irl Shutts, Executor, Individually and on behalf of all persons to whom this Notice is directed. He asks judgment against defendant for the payment of interest on royalties paid by defendant in 1972 and 1973 attributable to increased

gas sales prices received and withheld by defendant subsequent to June 1, 1961, or for damages in the form of a share of defendant's profits, if any, for the alleged use of that portion of the increase finally approved by the F.P.C. and in 1972 and 1973 paid by defendant to its royalty owners. The leases involved are in Kansas and in parts of Texas and Oklahoma. There are approximately 6,000 gas royalty owners who are members of the proposed class and the above mentioned payments to royalty owners were in excess of \$6,000,000.

Defendant Phillips has denied any liability to the plaintiff or members of the class herein described.

The court has held that this action is to be maintained as a class action. Accordingly:

1. The court will include as members of the plaintiff class herein all of the gas royalty owners addressed above; provided, however, any person or concern so included may by filing a written request to the Clerk of the District Court of Kiowa County, Kansas, Greensburg, Kansas 67054, on or before the 15th day of July, 1975, be excluded from the class unless upon notice and after hearing and for stated reasons the court finds that inclusion is essential to the fair and efficient adjudication of the controversy. Any class member, if he so desires, may appear in the case in person or through his own counsel; otherwise, Plaintiff's counsel will represent him as a member of plaintiff class.

2. Judgment in this action, whether for the plaintiff class or for the defendant, will be binding on all class members except those who may be excluded as above stated. Class members excluded will not be entitled to share in the benefit of any judgment or settlement entered or concluded favorable to plaintiff class.

3. Plaintiffs' attorneys' fees are contingent on recovery. If the plaintiffs are successful, the court will allow a reasonable attorneys' fee for plaintiffs' attorneys out of the interest fund created. If plaintiffs are unsuccessful, there will be no allowance of attorneys' fees.

Robert M. Baker, Judge of the
Sixteenth Judicial District.

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